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## “Brisas del Mar”: Judicial and Political Outcomes of the Cuban Rafter Crisis in Guantánamo

Christina Frohock

*University of Miami School of Law*, [cfrohock@law.miami.edu](mailto:cfrohock@law.miami.edu)

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# “BRISAS DEL MAR”: JUDICIAL AND POLITICAL OUTCOMES OF THE CUBAN RAFTER CRISIS IN GUANTÁNAMO

*Christina M. Frohock*<sup>1</sup>

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## INTRODUCTION

Following the tenth anniversary of the September 11th attacks, and in all the seemingly endless talk of whether to close the detention centers at the U.S. Naval Base in Guantánamo Bay, Cuba,<sup>2</sup> it is worth remembering that

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<sup>1</sup> Lecturer in Law, University of Miami School of Law. My thanks to Annette Torres and Judge Vance Salter for their encouragement and careful review and to Sarah Wyman for her research assistance. I am especially grateful to Marcos D. Jiménez, without whose generosity—of ideas, materials, and comments—I could not have written this Article. I look forward to his rebuttal.

<sup>2</sup> On January 22, 2009—forty-eight hours after his inauguration—President Obama signed an executive order directing closure of the Guantánamo detention centers within a year. In July 2009, the President granted an extension of six months for his task force to examine detention policy at the base. On December 16, 2009, the President signed an executive order acquiring an Illinois state prison as a replacement for the Guantánamo detention centers. On

now is not the first time the base has held a group of people the United States wanted to contain in a “rights-free zone.”<sup>3</sup> This Article casts a current eye on events before 9/11, exploring two contrasting outcomes of the U.S. government’s housing in Guantánamo camps of more than 33,000 Cuban rafters intercepted at sea in August 1994.

One outcome arose in the judicial sphere. This discussion focuses on the lawsuit the Cuban rafters filed while in Guantánamo, identifying themselves as refugees and seeking constitutional due process rights.<sup>4</sup> The Court of Appeals for the Eleventh Circuit in *Cuban American Bar Association, Inc. v. Christopher* (“CABA”) denied the rafters relief.<sup>5</sup> Describing them as “migrants” seeking freedom in the United States who were “temporarily provided safe haven,” the court concluded that these individuals were beyond the reach of the Constitution.<sup>6</sup> The Supreme Court declined to hear the case.<sup>7</sup> More than a decade later, however, the Supreme Court did hear and decide *Boumediene v. Bush*, a case concerning constitutional privileges for a different group in Guantánamo: foreign nationals apprehended in Afghanistan and other distant countries seeking constitutional habeas corpus rights.<sup>8</sup> In *Boumediene*, the Court granted relief to “enemy combatants” who allegedly sought to kill Americans and were “detained” in military prisons.<sup>9</sup> The Court found that these individuals captured in the War on Terror were within the reach of the Constitution.

A different outcome arose in the political sphere. This discussion focuses on the Cuban refugees’ desperate departures from their homeland and difficult lives in Guantánamo camps. Newly revealed documents from the CABA litigation, including thousands of handwritten requests for counsel, show the refugees’ frustration and despair in their own words. One wrote of fleeing Castro’s regime after being imprisoned in a place called Brisas del Mar or “Sea Breezes,” a poignant name for a site that held refugees who braved the open sea for freedom, only to be returned to camps on the Island. In the summer of 1995, the Clinton administration finally granted humanita-

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March 7, 2011, he signed an executive order permitting the base to continue detention operations. See Exec. Order No. 13492, 74 Fed. Reg. 4,897 (Jan. 22, 2009); Exec. Order No. 13524, 74 Fed. Reg. 67,803 (Dec. 16, 2009); Exec. Order No. 13567, 76 Fed. Reg. 13,277 (Mar. 7, 2011); see also *Guantánamo Bay Naval Base (Cuba)*, N.Y. TIMES, Apr. 25, 2011, available at <http://topics.nytimes.com/top/news/national/usstatesterritoriesandpossessions/guantanamobaynavalbasecuba/index.html>; Robert Farley, *Obama Announces Changes To Guantánamo Detention Policy*, ST. PETERSBURG TIMES, Mar. 9, 2011, available at <http://www.politifact.com/truth-o-meter/promises/obameter/promise/177/close-the-guantanamo-bay-detention-center/>.

<sup>3</sup> Petition for Writ of Certiorari at 24, *CABA v. Christopher*, 516 U.S. 913 (1995) (arguing that lower court ruling rendered Guantánamo “a ‘rights-free’ zone, in which U.S. officials exercise limitless power over refugees, free from any constraint imposed by U.S. law”) (phrase coined by Harold Hongju Koh) (No. 95-84).

<sup>4</sup> Haitian rafters, who were already in Guantánamo camps when the Cubans arrived, later intervened as additional plaintiffs in the lawsuit. See discussion *infra* Section II.A.2.

<sup>5</sup> 43 F.3d 1412 (11th Cir.), cert. denied, 516 U.S. 913 (1995).

<sup>6</sup> *Id.* at 1417, 1430.

<sup>7</sup> 516 U.S. 913 (1995).

<sup>8</sup> 553 U.S. 723 (2008).

<sup>9</sup> See *id.* at 732, 771.

rian parole to all Cubans remaining in Guantánamo.<sup>10</sup> In the end, the refugees received from the executive branch the relief they had been denied by the judiciary.

This Article argues that the outcome in each sphere was appropriate given how each depicted the facts. The courts drew a contrast between “migrants” housed in temporary “safe haven” and “enemy combatants” forcefully “detained” in military prisons, and conferred constitutional rights on only the latter. That outcome finds support in criminal jurisprudence, with the Sixth Amendment providing a ready example of rights attaching to status, and reconciles *CABA* and *Boumediene*. By contrast, the plight of the refugees ended when conditions in the camps became intolerable and military officials pressured the White House to permit humanitarian entry into the United States. That outcome finds support in conditions on the ground, with a political rather than judicial solution, and reflects the hardship of refugee camps in Guantánamo.

## I. PRE-9/11: REFUGEES IN GUANTÁNAMO

The story of the Cuban refugees in *CABA* is as much about individuals as it is about law, specifically constitutional law and its application to non-U.S. citizens outside U.S. borders. Ultimately, it is a story about the triumph of individuals outside the court system.

The *CABA* refugees arrived in Guantánamo in the summer of 1994, after being picked up at sea and diverted away from the United States, in a sudden reversal of U.S. policy. The background to their arrival stretches to 1959, when President Fidel Castro took power in Cuba. The United States has long viewed Castro’s regime as repressive and totalitarian, restricting basic political and civil rights.<sup>11</sup> Because this Article discusses Cuban nationals who were fleeing Castro’s regime and seeking a new, free life in the United States, the Article describes them as “refugees,” reflecting their self-identification, the United Nations’ definition of a refugee as “a person who has fled his/her country owing to well-founded fear of being persecuted,”<sup>12</sup>

<sup>10</sup> Most Haitian refugees in Guantánamo repatriated after Haitian President Jean-Bertrand Aristide returned to power in 1994. See discussion *infra* Sections I.C and V.

<sup>11</sup> See, e.g., *Lifting Cuba Sanctions: The Debate Over Travel and Remittances*, 7 CONG. DIG., Feb. 2009, available at <http://congressionaldigest.com/issue/lifting-cuba-sanctions/> (“Since Fidel Castro came to power in 1960, U.S. policy toward Cuba has sought to isolate the island nation through a comprehensive economic and trade embargo to protest the repressive policies of its communist government.”); Janet Reno, U.S. Attorney General, Press Briefing (Aug. 19, 1994) (“Castro, by his government—his rigid, repressive government—has created economic misery in Cuba.”); United States Navy Fact File, Naval Station Guantánamo Bay, Cuba (Nov. 8, 2011) (“United States and Cuban relations steadily declined as Fidel Castro openly declared himself in favor of Marxist ideology, and began mass jailing and executions of Cuban dissidents.”).

<sup>12</sup> The United Nations High Commissioner for Refugees adopted the definition from the 1951 United Nations Convention Relating to the Status of Refugees: “A refugee is a person who has fled his/her country owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is

and the dictionary definition of a refugee as “a person who flees to a foreign country or power to escape danger or persecution.”<sup>13</sup> The terminology is unavoidably loaded. The White House described the Cuban nationals as “migrants” and the issue of whether these individuals had been processed as refugees in Guantánamo arose in *CABA*.<sup>14</sup> The Eleventh Circuit chose the term “migrants,” foreshadowing its holding that the Cubans lacked constitutional protections.<sup>15</sup>

For decades prior to the summer of 1994, the vocabulary describing Cuban rafters was of less moment. The U.S. government had conferred on Cuban citizens the right to enter and remain in the United States, granting asylum to all who managed to escape the Island.<sup>16</sup> The Cuban Adjustment Act of 1966 permits “any native or citizen of Cuba” to apply for permanent resident alien status after one year in the United States.<sup>17</sup> This Act, as well as the Refugee Act of 1980,<sup>18</sup> the Cuban Democracy Act of 1992,<sup>19</sup> and the consistent policies of U.S. administrations dating back to President Kennedy, offered open arms to Cuban refugees fleeing Castro’s regime and seeking residency in the United States.

#### A. Cuban Rafters’ Sudden Arrival at Naval Base

On August 8, 1994, following a summer of violence in Cuba among refugees taking to the high seas to reach the United States, Castro announced that his government would no longer patrol the coast nor forcibly prevent emigration by boat.<sup>20</sup> Apparently fed up with the United States’ open-arms policy toward Cuban citizens, Castro opened the gates.<sup>21</sup>

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outside the country of his/her nationality, and is unable or, owing to such fear is unwilling to avail himself/herself of the protection of that country.” UNHCR, A POCKET GUIDE TO REFUGEES at 11 (2008).

<sup>13</sup> MERRIAM-WEBSTER ONLINE DICTIONARY, Entry for “refugee” (2011), available at <http://www.merriam-webster.com/dictionary/refugee>.

<sup>14</sup> See 43 F.3d at 1426.

<sup>15</sup> See *id.* at 1429-30 and discussion *infra* Section II.B; accord Janet Reno, U.S. Attorney General, Press Briefing (Aug. 19, 1994) (noting that, regarding the consideration of Cuban rafters as refugees, “we sometimes use terms that cause confusion”).

<sup>16</sup> See Act of Nov. 2, 1966, Pub. L. No. 89-732 (80 Stat. 1161) (adjusting status of Cuban refugees to that of lawful permanent residents).

<sup>17</sup> *Id.*

<sup>18</sup> Act of March 17, 1980, Pub. L. No. 96-212 (94 Stat. 102).

<sup>19</sup> 28 U.S.C. §§ 6001-6010.

<sup>20</sup> See 43 F.3d at 1417. In June 1994, Cuban authorities shot and killed a Cuban rafter attempting to flee the Island. Between July 13 and August 8, 1994, thirty-seven Cubans attempting to flee, as well as two Cuban officials, were killed in boat hijackings. On August 5, 1994, a riot broke out in Havana following a false rumor of boats picking up refugees. Castro then went on television to blame the United States for the unrest and demand that the United States deter rafters and return hijackers. See U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-95-211, CUBA: U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS (1995) at 3 [hereinafter GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS]; see also *CABA*, 43 F.3d at 1417.

<sup>21</sup> William J. Clinton, U.S. President, Statement on Cuba (Aug. 20, 1994) (“the Government of Cuba has taken action to provoke a mass exodus to the United States”).

Thousands of Cubans immediately boarded boats, rafts, and any make-shift vessels to flee across the Straits of Florida.<sup>22</sup> These departures were hasty, desperate, and dangerous. Several *balseros*—or rafters—died at sea, crammed aboard unsafe vessels and drowning in the strong currents between Cuba and South Florida.<sup>23</sup> Yet the risk of death did not deter many thousands from fleeing the Island in an attempt to reach the United States.

Within ten days of Castro’s announcement, approximately 8000 Cubans arrived in South Florida.<sup>24</sup> By contrast, the U.S. Coast Guard had previously rescued and brought to the United States only 1300 Cuban rafters during the first six months of 1993 and 4700 during the first six months of 1994.<sup>25</sup> In little more than a week in August 1994, the number of Cubans entering the United States across the Florida Straits had nearly doubled from the entire first half of the year.<sup>26</sup>

Although smaller in size, this new refugee influx conjured memories for many of the 1980 Mariel boatlift, during which 125,000 Cuban refugees arrived on the shores of South Florida.<sup>27</sup> Thus, in 1994, Florida Governor Lawton Chiles asked the Clinton administration to stop the influx and avoid a repeat of Mariel.<sup>28</sup> President Clinton took action.

On August 19, 1994, in response to what it called an “uncontrolled and dangerous outflow from Cuba,” the Administration changed the United States’ twenty-eight-year-old policy of welcoming Cuban nationals.<sup>29</sup> Clinton ordered the Coast Guard to intercept at sea all those employing “irregular means of migration to the United States on boats and rafts” and divert them away from the United States.<sup>30</sup> The President, who sought to handle the situation in “an orderly fashion,” intended to stanch the flow of rafters from Cuba and save the lives of those on unsafe boats and rafts.<sup>31</sup> He also kept pressure on Castro to initiate democratic reforms, refusing to allow Castro to “export his troubles to this country” and release the *balseros* as a “safety valve for his problems.”<sup>32</sup>

Cuban refugees, who had been hoping to reach the United States, were diverted to the nearest available spot that was both outside U.S. borders and

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<sup>22</sup> “Makeshift” is an understatement; some rafters fled Cuba floating on truck tires.

<sup>23</sup> See *CABA*, 43 F.3d at 1417 (“many were lost at sea”).

<sup>24</sup> See *id.*

<sup>25</sup> GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS, *supra* note 20, at 2-3.

<sup>26</sup> See *id.*

<sup>27</sup> *Administration, Lawyers Spar Over Cubans’ Return*, NAT’L L.J., Nov. 7, 1994, at 4; William Booth, *U.S. Is Sued For Detaining Cuba Refugees*, WASH. POST, Oct. 25, 1995, at A03.

<sup>28</sup> See William Booth, *U.S. Is Sued For Detaining Cuba Refugees*, WASH. POST, Oct. 25, 1995, at A03.

<sup>29</sup> Janet Reno, U.S. Attorney General, Press Briefing (May 2, 1995); see GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS, *supra* note 20, at 3; William Booth, *U.S. Is Sued For Detaining Cuba Refugees*, WASH. POST, Oct. 25, 1995, at A03.

<sup>30</sup> Janet Reno, U.S. Attorney General, Press Briefing (May 2, 1995).

<sup>31</sup> Dee Dee Myers, White House Press Secretary, Press Briefing (Aug. 18, 1994).

<sup>32</sup> Janet Reno, U.S. Attorney General, Press Briefing (Aug. 19, 1994) (United States was “making sure that Castro knows he’s got to solve his problems at home.”).

within U.S. control. The Coast Guard took these tens of thousands of refugees to the naval base in Guantánamo Bay, Cuba, an area wholly within the physical and legal control of the United States,<sup>33</sup> and the military quickly set up thousands of camps as “safe havens.”<sup>34</sup> Later, to relieve overcrowding in Guantánamo, military personnel temporarily transferred some refugees to camps in U.S.-controlled territory in Panamá.

Located in the Southeastern corner of Cuba, Guantánamo Bay is a large harbor surrounded by steep, semi-arid hills. The United States has had an ongoing presence in Guantánamo Bay for more than a century, originally using the site for defense purposes during the Spanish-American War. Under the “Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations,” dated February 23, 1903, and signed by Cuban President Tomás Estrada Palma and U.S. President Theodore Roosevelt, the United States assumed perpetual control over specified areas of Guantánamo Bay.<sup>35</sup>

The 1903 Lease Agreement is an exemplar of concision, comprising only three articles and fewer than 800 words. It expressly balances the continued sovereignty of Cuba with the exclusive jurisdiction and control of the United States:

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control . . . .<sup>36</sup>

By its terms, the “period of the occupation” could last forever, as the lease continues “for the time required for the purposes of coaling and naval stations.”<sup>37</sup> Underscoring the perpetual nature of this lease, the countries later agreed that it would remain in effect “[s]o long as the United States of America shall not abandon the said naval station of Guantánamo or the two governments shall not agree to a modification.”<sup>38</sup>

The U.S. naval base in Guantánamo (nicknamed “GTMO” or “Gitmo”) covers approximately forty-five square miles of land and water

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<sup>33</sup> See Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, Feb. 23, 1903, T.S. No. 418 [hereinafter 1903 Lease Agreement].

<sup>34</sup> See *Administration, Lawyers Spar Over Cubans' Return*, NAT'L L.J., Nov. 7, 1994, at 4.

<sup>35</sup> 1903 Lease Agreement, art. III. The United States must pay an annual rent of \$2000 “in gold coin of the United States” and maintain “permanent fences.” Lease of Certain Areas for Naval or Coaling Stations, U.S.-Cuba, arts. I-II, July 2, 1903, T.S. No. 426.

<sup>36</sup> 1903 Lease Agreement, art. III.

<sup>37</sup> *Id.* art. I.

<sup>38</sup> Treaty Defining Relations with Cuba, U.S.-Cuba, art. III, May 29, 1934, 48 Stat. 1683, T.S. No. 866; see Lease of Certain Areas for Naval or Coaling Stations, U.S.-Cuba, art. I, July 2, 1903, T.S. No. 426 (United States agrees to pay rent to Cuba “as long as the former shall occupy and use said areas of land”).

and, until the influx of Cuban rafters, had largely focused on its original “purposes of coaling and naval stations.”<sup>39</sup> Over time, fueling replaced coaling, and the naval station grew to form a town, complete with military housing, a Navy Exchange, a McDonalds, a Cuban restaurant, and an open-air movie theatre.

In August 1994, the *balseros* began arriving in Guantánamo under “Operation Sea Signal.”<sup>40</sup> President Clinton intended the operation to be “relatively short-term,” while his Administration sought a solution to the rafter crisis.<sup>41</sup> Military personnel in Guantánamo quickly absorbed tens of thousands of Cuban refugees, who were arriving daily under the command of the Coast Guard. Within one month, the camps housed approximately 45,000 refugees, comprising 33,000 newly arrived Cubans and 12,000 Haitians who were already there.<sup>42</sup> For those in service at the naval base, this was a purely humanitarian operation. The military understood that it had no law enforcement function, but only a humanitarian function to house, feed, and provide medical services and supplies to an influx of rafters considered migrants.<sup>43</sup>

The military housed the rafters in dusty camps filled with brown tarp tents and surrounded by razor concertina wire, a type of barbed wire formed in large coils and used as military obstacles.<sup>44</sup> Living conditions were at best, even in the words of Atlantic Command in Norfolk, Virginia, “marginal.”<sup>45</sup> Military officials scrambled to build tents, install portable toilets, and gather medical supplies and other necessities quickly and in mass quantities.<sup>46</sup> Refugees lost privacy, sleeping in tents containing up to fifteen cots each.<sup>47</sup> They waited in long lines for showers in the tropical heat.<sup>48</sup> With 3000 portable toilets, and temperatures regularly reaching the 80s and 90s,

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<sup>39</sup> 1903 Lease Agreement art. I.

<sup>40</sup> See United States Navy Fact File, Naval Station Guantánamo Bay, Cuba (Nov. 8, 2011).

<sup>41</sup> Janet Reno, U.S. Attorney General, Press Briefing (Aug. 19, 1994); see *19 Cubans Flee Refugee Camp In Panamá 8 Others Start Hunger Strike, Demanding To Be Allowed Into U.S.*, MIAMI HERALD, Oct. 28, 1994, at 10A.

<sup>42</sup> See discussion *infra* Section I.C; GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS, *supra* note 20, at 3, 9; United States Navy Fact File, Naval Station Guantánamo Bay, Cuba (Nov. 8, 2011).

<sup>43</sup> See E-mail from Randy Beardsworth, Catalyst Partners, to author (July 17, 2011) (describing “migrant operations”) (on file with author); telephone interview with Randy Beardsworth, Catalyst Partners (July 22, 2011); Janet Reno, U.S. Attorney General, Press Briefing (Aug. 19, 1994) (“in this situation, we’re looking at migrants . . . we are trying to address the humanitarians concerns and make sure that their safety is protected”).

<sup>44</sup> William Booth, *U.S. Is Sued For Detaining Cuba Refugees*, WASH. POST, Oct. 25, 1995, at A03.

<sup>45</sup> GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS, *supra* note 20, at 9. If the 33,000 Cuban refugees in Guantánamo were spread out evenly over the forty-five square miles of the naval base, each square mile would contain more than 733 people. Including the 12,000 Haitian refugees, the result is 1000 people per square mile. By contrast, the State of Florida contains only 350 people per square mile. U.S. CENSUS, RESIDENT POPULATION DATA FOR FLORIDA (2010).

<sup>46</sup> See GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS, *supra* note 20, at 9.

<sup>47</sup> See *id.*; Fabiola Santiago, *No Way Out: Cubans Feel Frustrated, Forgotten*, MIAMI HERALD, Oct. 2, 1994, at 1A.



the stench of human waste and filth was unavoidable.<sup>49</sup> Six residents in the more rustic camps contracted Hepatitis A, a disease spread in feces.<sup>50</sup> Guantánamo officials found it difficult to deliver medical care to tens of thousands of refugees on a naval base that had been designed to house a few thousand military personnel with their families.<sup>51</sup>

Conditions improved over time, as the camps spread through downtown Guantánamo with its small-town facilities and feel.<sup>52</sup> Yet, the days and problems of mass confinement increased, with no prospect of an end date or solution. Communications with the outside world were scant for the first several months.<sup>53</sup> Telephones were finally installed for collect calls to the United States in mid-October, two months after the rafters' arrival. Mail was delivered and posted—using special "Migrant Mail" stamps on the envelopes<sup>54</sup>—for the first time in mid-November. One refugee hung a sign on his tent expressing frustration with the President: "Clinton, why freedom in this manner?"<sup>55</sup>

### B. The "Clinton-Castro Accord"

While the camp residents waited, frustrated, in Guantánamo, and while the military pursued, remarkably, its humanitarian objective of housing tens of thousands of *balseros* on short notice, the U.S. government had begun negotiating with the Cuban government almost immediately after the *bal-*

<sup>48</sup> See *Will More Rafters Be Eased into the United States?*, MIAMI HERALD, Oct. 29, 1994, at 28A.

<sup>49</sup> See Fabiola Santiago, *No Way Out: Cubans Feel Frustrated, Forgotten*, MIAMI HERALD, Oct. 2, 1994, at 1A.

<sup>50</sup> See *Cubans at Base, Inoculated After 6 Hepatitis Cases Found*, MIAMI HERALD, Nov. 18, 1994, at 11A.

<sup>51</sup> See Fabiola Santiago, *No Way Out: Cubans Feel Frustrated, Forgotten*, MIAMI HERALD, Oct. 2, 1994, at 1A.

<sup>52</sup> See U.S. DEP'T OF STATE DISPATCH, Vol. 5, No. 44, Art. 6 (Oct. 31, 1994) (statement of Dee Dee Myers, White House Press Secretary) ("[A]lthough much remains to be done, significant improvements have been made in the camps, including providing better food, inaugurating mail and telephone service, and improving sanitary conditions."). Given the size of the camps and the unclear duration of the refugees' stay, Guantánamo played host to the basic infrastructure of a community: schools, churches, libraries, and recreation centers. See GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS, *supra* note 20, at 12; Mireya Navarro, *Last of Refugees From Cuba In '94 Flight Now Enter U.S.*, N.Y. TIMES, Feb. 1, 1996, at 8. The refugees played sports, watched movies, listened to music, and read in libraries. See GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS, *supra* note 20, at 12. Singer Gloria Estefan, herself a Cuban refugee, flew to Guantánamo from Miami and gave a concert to camp residents. Baseball players from the Florida Marlins team visited, as well. See Ronnie Ramos, *Arocha Sees Friend In Guantánamo Visit*, MIAMI HERALD, Dec. 1, 1994, at 1D.

<sup>53</sup> See Joanne Cavanaugh, *What Detained Refugees Don't Hear, They Imagine Fear, Hope Feed Guantánamo Rumor Mill*, MIAMI HERALD, Nov. 7, 1994, at 17A.

<sup>54</sup> Notes of Marcos Jiménez, Attorney (on file with author); see Joanne Cavanaugh, *What Detained Refugees Don't Hear, They Imagine Fear, Hope Feed Guantánamo Rumor Mill*, MIAMI HERALD, Nov. 7, 1994, at 17A.

<sup>55</sup> Liz Balmaseda, *Pleading For Liberty*, MIAMI HERALD, Oct. 2, 1994, at 1A ("¿Clinton, por qué libertad de esta manera?").

seros’ departure from Cuba in August. These diplomatic negotiations yielded an agreement to stop the mass departure of rafters, but provided no apparent solution for those already in Guantánamo.

On September 9, 1994, the United States and Cuba issued a Joint Communiqué that the two countries had “agreed to take measures to ensure that migration between the two countries is safe, legal, and orderly.”<sup>56</sup> This agreement—derisively called the “Clinton-Castro Accord” in private conversations among Miami attorneys representing the Guantánamo refugees—formally ended the open-arms policy of the United States toward Cubans and codified Operation Sea Signal. Also, as a lexical preview of the later Eleventh Circuit opinion ruling against the Cubans in Guantánamo, the September 9th agreement described an influx of “rescued” “migrants” in “safe haven,” rather than refugees in detention: “migrants rescued at sea attempting to enter the United States will not be permitted to enter the United States, but instead will be taken to safe haven facilities outside the United States.”<sup>57</sup> According to an officer of the U.S. Coast Guard at the time, it was “essential for the government to make that distinction” because, from the perspective of officials on the ground and at sea, adopting the refugee vocabulary would “limit the flexibility of what you can do.”<sup>58</sup>

The United States agreed that it would allow Cuban refugees—or migrants—to enter the United States only by applying for immigrant visas or refugee admittance at the U.S. Interests Section in Havana, Cuba.<sup>59</sup> The United States further agreed to admit at least 20,000 Cubans per year, processed in Havana.<sup>60</sup> In exchange, Castro agreed to prevent further departures of rafters using whatever “effective measures” he considered “mainly persuasive.”<sup>61</sup> This accord successfully stopped the exodus of rafters.<sup>62</sup>

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<sup>56</sup> *Cuba-United States: Joint Statement On Normalization Of Migration, Building On The Agreement Of September 9, 1994*, 35 INT’L LEGAL MATERIALS, 327, 329-30 (1996). President Clinton issued a one-sentence statement of encouragement: “This agreement, when carried out, will help ensure that the massive flow of dangerous and illegal migration will be replaced by a safer, legal, and more orderly process.” William J. Clinton, U.S. President, Statement on the Cuba-United States Agreement on Migration (Sept. 9, 1994).

<sup>57</sup> *Cuba-United States: Joint Statement On Normalization Of Migration, Building On The Agreement Of September 9, 1994*, 35 INT’L LEGAL MATERIALS, 327, 329-30 (1996).

<sup>58</sup> Telephone interview with Randy Beardsworth, Catalyst Partners (July 22, 2011).

<sup>59</sup> GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS, *supra* note 20, at 2-3.

<sup>60</sup> *Cuba: Implementation of Migration Agreement*, Statement by Christine Shelly, Acting Spokesperson for the U.S. Department of State (Oct. 12, 1994). This number did not include immediate relatives of U.S. citizens, who were under no numerical restrictions.

<sup>61</sup> *Cuba-United States: Joint Statement On Normalization Of Migration, Building On The Agreement Of September 9, 1994*, 35 INT’L LEGAL MATERIALS, 327, 329-30 (1996); see GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS, *supra* note 20, at 2.

<sup>62</sup> Luisa Yanez, *Suit Says Rafters Should Be Able To Seek Asylum*, S. FLA. SUN-SENTINEL, Oct. 25, 1994, at 6A (quoting Dennis Hays, then Coordinator for Cuban Affairs at U.S. State Department). A former officer of the Coast Guard, Randy Beardsworth, expressed relief, stating that the agreement between the United States and Cuba was important because it “stemmed the uncontrolled flow of migrants out of Cuba,” which had been “very dangerous and very costly in lives.” Telephone interview with Randy Beardsworth, Catalyst Partners (July 22, 2011).

Under new U.S. policy, Cuban “migrants” intercepted at sea and brought to Guantánamo or Panamá camps had three options: (1) remain in the camps in “safe haven”; (2) repatriate to sovereign Cuba and seek formal relief through the U.S. Interests Section in Havana; or (3) travel to a third country willing to accept them. The key to this policy was the requirement that refugees seek entry into the United States indirectly, that is, back through Cuba. Attorney General Janet Reno ordered that no Cuban migrant who had accepted safe haven in Guantánamo or Panamá would be allowed to apply directly for a visa or asylum in the United States. For his part, Castro pledged to receive the Guantánamo refugees back into his territory without reprisals—a pledge that was openly doubted by many, including Amnesty International and at least one noted survivor of Cuban prisons.<sup>63</sup> The upshot: by halting asylum or visa applications from Guantánamo to the United States, the September 9th agreement blocked the only path for Cuban refugees to seek legal entry into the United States from outside the confines of sovereign Cuba.<sup>64</sup>

Implementation of the agreement was far from smooth. Castro was not pleased with the United States’ use of Cuban land in Guantánamo to house Cuban refugees, accusing President Clinton of creating a “concentration camp” on territory Castro still considered an illegal U.S. occupation.<sup>65</sup> Yet, despite Castro’s complaints about the camps, he did not act promptly to relieve the overcrowding by welcoming back his citizens. Instead, the Cuban government restricted the refugees’ return and delayed the voluntary repatriation process.<sup>66</sup> Meanwhile, the U.S. government was negotiating with other countries to admit the refugees, and the refugees faced two choices: stay or go home.

The U.S. government stated that it did not want to detain the Cuban refugees for an indefinite time or against their will.<sup>67</sup> It could have forcibly returned them to sovereign Cuba, but instead granted all refugees safe haven

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<sup>63</sup> See Amnesty Int’l, United States/Cuba: Cuban “Rafters” – Pawns of Two Governments, available at <http://www.amnestyusa.org> (“substantial number” of Cuban refugees in Guantánamo “could be at risk of human rights violations if required to return home”). Members of Amnesty International had visited the camps on September 25 and 26, 1994. See also *Protesters in D.C. Decry U.S. Treatment of Cuban Rafters*, MIAMI HERALD, Oct. 14, 1994, at 17A (quoting Armando Valladares, who spent twenty-two years in Cuban prisons and later served as U.S. representative to the United Nations Commission on Human Rights under Presidents Reagan and Bush, that “Clinton and Castro are in a partnership in repressing the Cuban people”); Andres Viglucci, *Repatriation Of Rafters Is Blocked*, MIAMI HERALD, Oct. 26, 1994, at 1A.

<sup>64</sup> See Andres Viglucci, *Repatriation Of Rafters Is Blocked*, MIAMI HERALD, Oct. 26, 1994, at 1A. Although the White House raised the possibility of migrants seeking entry to the United States via process in a third country, many doubted the viability of this option. See Memorandum from Jorge L. Hernandez-Toraño to Comm. for Freedom of Guantanamo Detainees (Oct. 18, 1994) (on file with author).

<sup>65</sup> *Flight From Cuba: In Cuba; Cuba Assails Clinton on Guantánamo Detentions*, N.Y. TIMES, Aug. 21, 1994, at A28.

<sup>66</sup> See *CABA*, 43 F.3d at 1418.

<sup>67</sup> See *id.*; Memorandum from Jorge L. Hernandez-Toraño to Comm. for Freedom of Guantanamo Detainees (Oct. 18, 1994) (on file with author).

for as long as they wished to stay in camps in Guantánamo or Panamá. According to the joint military task force in charge of the camps, those camps provided a site for the refugees to acquire skills and prepare for the future.<sup>68</sup> It was an opportunity for betterment. The Office of the United Nations High Commissioner for Refugees participated in the repatriation process to ensure that any refugee who returned to Cuba did so voluntarily.<sup>69</sup> Other humanitarian groups also participated in or monitored the process, including Amnesty International, the U.S. Committee for Refugees, and Church World Service.<sup>70</sup>

As the refugees learned of the September 9th agreement over radio broadcasts, more than 2500 protested what appeared to them to be official sanction of their indefinite detention.<sup>71</sup> A camp protest that began peacefully turned violent within forty-eight hours.<sup>72</sup> Back in the United States, supporters rallied and marched in the Little Havana neighborhood of Miami and in front of the Department of Justice in Washington, D.C., in solidarity with the Cuban refugees and against their continued detention.<sup>73</sup>

On October 14, 1994, U.S. policy again shifted. On humanitarian grounds, Attorney General Reno would parole into the United States any Cuban refugees who had sponsors and were (1) over the age of 70; (2) chronically ill, along with their caregivers; or (3) unaccompanied minors.<sup>74</sup> These three protocols affected fewer than 500 refugees.<sup>75</sup> Attorney General Reno later added a fourth protocol: she would consider parole on a case-specific basis for children and their immediate families who would be “adversely affected by long-term presence in safe haven.”<sup>76</sup> With this additional humanitarian protocol—now four months into the refugees’ plight—the United States effectively admitted that life in Guantánamo would be “long-term.”

In total during Operation Sea Signal, approximately 33,000 Cuban refugees were intercepted at sea and taken to Guantánamo camps.<sup>77</sup> This number

<sup>68</sup> See Mireya Navarro, *Last of Refugees From Cuba In '94 Flight Now Enter U.S.*, N.Y. TIMES, Feb. 1, 1996, at 8.

<sup>69</sup> See CABA, 43 F.3d at 1418.

<sup>70</sup> See *id.*

<sup>71</sup> See *Cuban Detainees Protest Accord*, N.Y. TIMES, Sept. 11, 1994, at 18.

<sup>72</sup> See *id.*

<sup>73</sup> See *Protesters in D.C. Decry U.S. Treatment of Cuban Rafters*, MIAMI HERALD, Oct. 14, 1994, at 17A; *March Was Huge Wave of Hope for Cuban Freedom*, MIAMI HERALD, Dec. 14, 1994, at 1B.

<sup>74</sup> U.S. DEPT OF STATE DISPATCH, Vol. 5, No. 44, Art. 6 (Oct. 31, 1994) (statement of Dee Dee Myers, White House Press Secretary); see GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS, *supra* note 20, at 4; *Repatriations to Cuba Off Indefinitely*, MIAMI HERALD, Nov. 1, 1994, at A1; William Booth, *U.S. Is Sued For Detaining Cuba Refugees*, WASH. POST, Oct. 25, 1995, at A03.

<sup>75</sup> See William Booth, *U.S. Is Sued For Detaining Cuban Refugees*, WASH. POST, Oct. 25, 1995, at A03; Christopher Marquis & Mirta Ojito, *Asylum Given To Hundreds Of Rafters, Elderly, Young And Sick Refugees To Win Freedom*, MIAMI HERALD, Oct. 15, 1994, at 1A.

<sup>76</sup> GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS, *supra* note 20, at 4. Attorney General Reno added this fourth protocol on December 2, 1994.

<sup>77</sup> Reflecting the large scale and changing conditions at the camps, the exact number of Cuban refugees taken to Guantánamo is difficult to ascertain. Sources generally mark the

included more than 8000 who had been transferred to camps in Panamá after September 1994 due to overcrowding and then transferred back to Guantánamo.<sup>78</sup> The refugees came from all over Cuba, and the population statistics reveal that the camps housed primarily adult men.<sup>79</sup> Eighty-one percent of the refugees were men, and nineteen percent were women; ten percent were under the age of eighteen, and only one percent were over the age of sixty.<sup>80</sup>

Not surprisingly, in light of the massive size of the refugee population in Guantánamo, the financial costs to the United States were steep. From August 1994, when the rafter crisis began, through fiscal year 1995, the United States spent nearly half a billion dollars responding to the Cuban rafter crisis.<sup>81</sup> This high financial commitment underscored the seemingly endless nature of the refugees' wait for relief. In December 1994—four months after Castro's August announcement and the mass departure of *balseros*—the United States undertook a "Quality of Life" upgrade program, intending to spend an additional \$35 million from Defense Department operating funds over the following six months to improve living conditions in Guantánamo.<sup>82</sup> The bottom line was clear: no end was in sight.

### C. Haitian Rafterers Already at Naval Base

Guantánamo Bay had more than just proximity and military presence to recommend it as the prime location for housing Cuban rafters in August 1994. In prior litigations concerning Haitian rafters in Guantánamo, courts had denied them legal protections.<sup>83</sup> The Eleventh Circuit Court of Appeals had gone so far as to declare "nonsensical" the idea of recognizing a First

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number between 32,000 and 33,000. See Motion for Summary Reversal, or, in the Alternative, for an Emergency Stay Pending Appeal at 3, *CABA v. Christopher*, 43 F.3d 1412 (11th Cir. 1995) (stating 32,000 migrants); GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS, *supra* note 20, at 3 (stating 33,000 migrants); see also 85 *Cuban Refugees Flee Guantánamo; 46 Are Recaptured*, MIAMI HERALD, Nov. 7, 1994, at 17A (stating 24,000 refugees in Guantánamo and 8000 in Panamá); William Booth, *U.S. Is Sued For Detaining Cuba Refugees*, WASH. POST, Oct. 25, 1995, at A03 (stating 23,699 refugees in Guantánamo and 8206 in Panamá).

<sup>78</sup> See *Cubans Told They Will Return To Guantánamo Transfer To Begin In February*, MIAMI HERALD, Jan. 13, 1995, at 18A.

<sup>79</sup> See Fabiola Santiago, *No Way Out: Cubans Feel Frustrated, Forgotten*, MIAMI HERALD, Oct. 2, 1994, at 1A (reporting Sept. 21, 1994, information from U.S. military).

<sup>80</sup> See *id.*

<sup>81</sup> GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS, *supra* note 20, at 6-7 (Defense Department expenses included "shipping food and supplies [and] transporting military personnel"; Coast Guard expenses included "patrolling the waters between Cuba and Florida and bringing people to Guantánamo Bay and Cuba"; and State Department expenses included "expanding consular processing in Havana and providing a liaison officer at Guantánamo Bay").

<sup>82</sup> *Id.* at 9; see *Guantánamo Camps Look More Permanent*, CHI. TRIB., Dec. 16, 1994, at 36.

<sup>83</sup> See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-88 (1993) (permitting forced repatriation of Haitians interdicted at sea, without providing opportunity for refugee screening) (oral argument by *CABA* attorney Harold Hongju Koh); *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498, 1511 (11th Cir.) (finding no right of action for interdicted Haitians under repatriation order), *cert. denied*, 502 U.S. 1122 (1992); *Haitian Refugee Center, Inc. v. Baker*,

Amendment right of access to Haitians in Guantánamo, as “interdicted Haitians have no recognized substantive rights under the laws or Constitution of the United States.”<sup>84</sup> So when Cuban refugees arrived at the base, the camps were hardly empty; in addition to naval personnel, there were already thousands of Haitian refugees under United States safe haven protection: 16,800 at the peak of the Haitian emigration in 1994.<sup>85</sup>

Like the Cuban refugees, the Haitian refugees had fled political oppression in their homeland. In 1991, the democratically elected President of Haiti, Jean-Bertrand Aristide, was overthrown in a military coup and forced into exile. Thousands of Haitians took to the sea to flee the Island and escape to the United States. Following U.S. policy, the Coast Guard intercepted Haitian refugees bound for the United States and returned them to Haiti.<sup>86</sup>

In June 1994, only two months before the Cuban rafter crisis, the United States changed its policy toward Haitian refugees. Rather than returning them to Haiti, the U.S. government began processing them for asylum in the United States.<sup>87</sup> In a preview of its treatment of the Cuban refugees, however, the government did not allow the Haitian refugees to enter the United States directly; instead, it offered them safe haven in camps in Guantánamo.<sup>88</sup>

On September 19, 1994, the United States led a United Nations-authorized military intervention in Haiti. On October 15, 1994, Aristide returned from exile and reclaimed the presidency. Following the return of Aristide, many Haitians in Guantánamo voluntarily repatriated to Haiti, and the number of Haitian refugees in the camps decreased to approximately 8000 by the end of 1994.<sup>89</sup>

## II. CABA: “A GRATUITOUS HUMANITARIAN ACT”

The circumstances of the Cuban refugees and their sudden *en masse* arrival to join the Haitian refugees in Guantánamo in August 1994 were not only compelling on a human level, but also ripe for litigation as to the refugees’ constitutional rights. While they waited for something, anything, to happen, a lawsuit in Miami, Florida, was fast in the making.

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950 F.2d 685, 687 (11th Cir. 1991) (staying and suspending temporary restraining order preventing repatriation of interdicted Haitians).

<sup>84</sup> *Haitian Refugee Center, Inc.*, 953 F.2d at 1513.

<sup>85</sup> See GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS, *supra* note 20, at 9; CABA, 43 F.3d at 1419.

<sup>86</sup> See CABA, 43 F.3d at 1419.

<sup>87</sup> See *id.*

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

### A. *Relief Granted by Trial Court*

Cuban-American attorneys and community leaders in Miami were watching the rafter crisis, and many were distressed by the Clinton administration's response. Ready to sue the U.S. government on behalf of the *balseros*, Miami attorneys first sought direct relief from the executive branch. On October 13, 1994, they flew to Washington, D.C., for a private meeting with White House officials.<sup>90</sup> The attorneys hoped to gain access to the refugees in Guantánamo and to secure their prompt release into the United States, not back into Cuba, as was prescribed by the countries' September 9th agreement.<sup>91</sup>

All participants in the meeting shared a long-term goal: an open and democratic Cuba.<sup>92</sup> After ninety minutes, however, the discussion reached an impasse on the short-term issue of repatriation.<sup>93</sup> The attorneys did not want Cuban "refugees" to have to return to the communist land they had fled in order to seek asylum in the United States, while the government refused to allow the "migrants" to come directly into the United States or to offer them an opportunity to claim asylum in Guantánamo.<sup>94</sup> White House officials refused to recognize the Cubans as detained refugees.<sup>95</sup> The officials saw them as migrants who were not in detention but instead had chosen to "hit" rafts rather than apply for asylum at the U.S. Interests Section in Havana, and who were now choosing to stay in camps rather than return to Havana for orderly processing.<sup>96</sup> Lacking White House support, the *balseros* filed suit.

#### 1. *Cuban Refugee Plaintiffs' Filing of Lawsuit*

On October 24, 1994, the Cuban refugees and their attorneys filed *CABA v. Christopher* as a class action in U.S. District Court for the Southern District of Florida, seeking due process rights and access to counsel for refu-

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<sup>90</sup> Memorandum from Jorge L. Hernandez-Toraño to Comm. for Freedom of Guantanamo Detainees (Oct. 18, 1994) (on file with author).

<sup>91</sup> *Id.*

<sup>92</sup> See *id.*; accord Janet Reno, U.S. Attorney General, Press Briefing (Aug. 19, 1994) ("The problems of Cuba have got to be solved there by democratic reform . . .").

<sup>93</sup> See Memorandum from Jorge L. Hernandez-Toraño to Comm. for Freedom of Guantanamo Detainees (Oct. 18, 1994) (on file with author).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* In what may have been a further attempt to avoid litigation, I.N.S. Commissioner Doris Meissner offered in a letter to provide the Miami attorneys "access to the camps" and "contact with migrants," subject to "restrictions dictated by security and operational considerations." Letter from Roberto Martínez, Attorney, to Seth Waxman, Associate Deputy Attorney General, U.S. Department of Justice (Nov. 15, 1994) (quoting Meissner letter) (on file with author). This olive branch—or whatever it was intended to be—failed. The same day of Meissner's letter, the Guantánamo refugees filed their lawsuit.

gees.<sup>97</sup> The complaint requested declaratory and injunctive relief under, inter alia, the First and Fifth Amendments to the Constitution.<sup>98</sup>

The Cuban American Bar Association (“CABA”) is a large and successful voluntary bar association that has been a prominent force in the Miami legal community since its founding in 1974. Other named plaintiffs were individual refugees in the Guantánamo camps, and their inclusion highlighted the personal stakes in the litigation. One plaintiff was a twelve-year-old girl, Lizbet Martínez, who had fled Cuba in August 1994 with her parents and ten other refugees on a raft.<sup>99</sup> Martínez was a talented violinist who played the Star-Spangled Banner for the Coast Guard, Guantánamo military personnel, and other refugees.<sup>100</sup>

The CABA litigation was an instant sensation in the Miami media, and stories ran nearly every day in local newspapers.<sup>101</sup> The plight of tens of thousands of Cubans stranded in U.S.-controlled territory just south of Miami was emotional and gripping. Increasing the emotional intensity was the fact that the interception of these refugees at sea and their diversion to Guantánamo reversed a decades-old policy of welcoming Cubans into the United States—a reversal that occurred *after* the refugees had fled Cuba in reliance on the open-arms policy.

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<sup>97</sup> CABA v. Christopher, Case No. 94-2183-CIV-ATKINS.

<sup>98</sup> The case was initially assigned to Judge Wilkie Ferguson, who recused himself, and then re-assigned to now-Chief Judge Federico Moreno, who also recused himself. The case was finally re-assigned to Judge C. Clyde Atkins, who adjudicated the matter. This case was not Judge Atkins’ first significant refugee litigation, and his presiding over the CABA case bode well for the plaintiffs at the trial level. In *Haitian Refugee Center, Inc. v. Baker*, Judge Atkins had ruled that the First Amendment likely gave immigration lawyers the right to counsel Haitians intercepted at sea. On appeal, the Eleventh Circuit reversed his rulings, holding that constitutional rights apply only to those within U.S. borders. See *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498, 1513 (11th Cir.), cert. denied, 502 U.S. 1122 (1992); *Haitian Refugee Center, Inc. v. Baker*, 950 F.2d 685 (11th Cir. 1991); see also Editorial, *Judge Atkins Is Right*, MIAMI HERALD, Nov. 2, 1994, at 14A.

<sup>99</sup> See Andres Viglucci, *Suit Demands Freedom For Cuban Rafters Panamá, Guantánamo Camps Called Illegal*, MIAMI HERALD, Oct. 25, 1994, at 1A.

<sup>100</sup> See *id.*; Madeline Baro Diaz, *A Star-Spangled Performance From Her Rescue From A Raft To Her Graduation, The National Anthem Has Been Her Tune*, S. FLA. SUN-SENTINEL, Dec. 17, 2003, at 1B; Liz Balmaseda, *Pleading For Liberty*, MIAMI HERALD, Oct. 2, 1994, at 1A. More than sixty attorneys represented the plaintiffs *pro bono*, including Cuban refugees Frank Angones, who later became president of the Florida Bar Association; Marcos Jiménez, who later served as U.S. Attorney for the Southern District of Florida just after September 11, 2001; and Roberto Martínez, who had previously served as U.S. Attorney for the Southern District of Florida. Also involved was Yale Law School professor Harold Hongju Koh, who later became Dean and now serves as Legal Advisor in the U.S. State Department under Secretary of State Hillary Clinton. Just before joining the CABA counsel team, Koh had argued the case of *Sale v. Haitian Centers Council, Inc.* in the Supreme Court on behalf of Haitian refugees intercepted at sea and forcibly repatriated. 509 U.S. 155 (1993); see Ardy Friedberg, *Yale Professor Leads Fight To Help Refugees*, S. FLA. SUN-SENTINEL, Nov. 1, 1994, at 6A.

<sup>101</sup> Recognizing the media attraction to their case, the CABA attorneys prepared a list of potential questions and answers for press conferences, highlighting the justice of their cause. Press Conference Q&A (on file with author). They sought access to the refugees “to protect them from coerced repatriation, to assure humane treatment while they are waiting to be processed as refugees, and to seek an end to their indefinite detention.” *Id.* The attorneys were “confident that we will prevail” because “[o]ur cause is just and right.” *Id.*



In their class action, as in their attorneys' pre-litigation meeting with White House officials, *CABA* plaintiffs focused on the new U.S. policy of "coerced repatriation."<sup>102</sup> Cuban refugees faced an unreasonable choice of either staying in U.S.-controlled camps or returning to sovereign Cuba.<sup>103</sup> Repatriation must be based on informed consent, which, by definition, must be based on information.<sup>104</sup> But refugees held in Guantánamo and Panamá camps did not and could not know what awaited them back in Castro-controlled Cuba unless they consulted with counsel.<sup>105</sup> Accordingly, the plaintiffs requested that the district court grant attorneys reasonable access to refugees for legal consultation.<sup>106</sup> They also requested an injunction prohibiting the government from repatriating or "encouraging or coercing, directly or indirectly" the repatriation to Cuba of any refugee in Guantánamo.<sup>107</sup>

By the date of the lawsuit, 1000 Cuban refugees in Guantánamo—out of 33,000 total—had requested in writing to be returned home to sovereign Cuba as soon as possible.<sup>108</sup> Others told base officials that they wanted to go home.<sup>109</sup> Yet only forty-two had been repatriated because the Cuban government had been slow to approve the list of names.<sup>110</sup> The filing of the complaint spurred action on the repatriation front. By the next morning, twenty-three refugees who had previously volunteered for repatriation were boarding a plane for sovereign Cuba.

Plaintiffs moved to block all repatriations, including the government's imminent flight. Conditions in the camps were so poor that the refugees had been coerced into seeking repatriation: escapism rather than informed consent.<sup>111</sup> One minute before the plane was scheduled to depart, *CABA* Judge C. Clyde Atkins ordered the government to stop the repatriations, and the

<sup>102</sup> See *id.*; Class Action Complaint ¶¶ 54, 64-67, *CABA v. Christopher*, No. 94-CV-2183 (S.D. Fla. Oct. 24, 1994) (No. 1).

<sup>103</sup> See Press Conference Q&A (on file with author); Class Action Complaint ¶¶ 54, 64-67, *CABA v. Christopher*, No. 94-CV-2183 (S.D. Fla. Oct. 24, 1994) (No. 1).

<sup>104</sup> See Class Action Complaint ¶¶ 64-67, *CABA v. Christopher*, No. 94-CV-2183 (S.D. Fla. Oct. 24, 1994) (No. 1).

<sup>105</sup> See *id.*; *Administration, Lawyers Spar Over Cubans' Return*, NAT'L L.J., Nov. 7, 1994, at 4.

<sup>106</sup> Class Action Complaint at 58-59, *CABA v. Christopher*, No. 94-CV-2183 (S.D. Fla. Oct. 24, 1994) (No. 1).

<sup>107</sup> *Id.*

<sup>108</sup> See Andres Viglucci, *Just Let Us Go Home, 21 Cubans Ask Judge*, MIAMI HERALD, Oct. 28, 1994, at 1A; Andres Viglucci, *Judge Lifts Orders Halting Repatriations Ruling Affects 1,000 Cuban Detainees*, MIAMI HERALD, Nov. 4, 1994, at 1A; *Administration, Lawyers Spar Over Cubans' Return*, NAT'L L.J., Nov. 7, 1994, at 4; *85 Cuban Refugees Flee Guantánamo; 46 Are Recaptured*, MIAMI HERALD, Nov. 7, 1994, at 17A.

<sup>109</sup> Karen Branch, *Guantánamo Cubans' Patience Thin*, MIAMI HERALD, Oct. 20, 1994, at 18A.

<sup>110</sup> See *Administration, Lawyers Spar Over Cubans' Return*, NAT'L L.J., Nov. 7, 1994, at 4; Andres Viglucci, *Repatriation Of Rafters Is Blocked*, MIAMI HERALD, Oct. 26, 1994, at 1A.

<sup>111</sup> Cf. Class Action Complaint ¶¶ 64-67, *CABA v. Christopher*, No. 94-CV-2183 (S.D. Fla. Oct. 24, 1994) (No. 1).

flight was aborted.<sup>112</sup> Judge Atkins also gave the attorneys “reasonable and meaningful access” to the “detained plaintiff refugees.”<sup>113</sup>

While litigation was accelerating, tensions in the Guantánamo camps were rising, with escape attempts and fights among the refugees.<sup>114</sup> Several refugees crushed fences and jumped off a forty-foot cliff into the sea, risking their safety trying to flee back into Castro-controlled land.<sup>115</sup> The government—recognizing that the threat of violence among frustrated refugees was “acute”—quickly moved the Eleventh Circuit for summary reversal of Judge Atkins’ order.<sup>116</sup> The Eleventh Circuit overturned the district court’s complete ban on repatriations, but permitted plaintiffs’ attorneys to visit the camps.<sup>117</sup> Military personnel at the base were left to run the camps while following these changing instructions from the courts. Still, the military remained aware that it was always “dealing with human stories, not just legal principles.”<sup>118</sup>

Back in the Miami courthouse, the refugees’ human stories were unfolding against the backdrop of legal principles. The Eleventh Circuit granted plaintiffs’ attorneys reasonable access to their clients in Guantánamo and to “any other detainees” who made a written request for legal counsel; allowed the government to repatriate “detainees who express a desire by written declaration to be returned to sovereign Cuba”; and prohibited the government from repatriating any who did not make that written declara-

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<sup>112</sup> See *Administration, Lawyers Spar Over Cubans’ Return*, NAT’L L.J., Nov. 7, 1994, at 4. CABA attorney Marcos Jiménez described the last-minute order as “a squeaker.” Juan J. Walte, *Fate Of Cuban Refugees May Be Decided Today*, U.S.A. TODAY, Oct. 26, 1994, at 1A; see Andres Viglucci, *Repatriation Flights To Cuba Stay Grounded*, MIAMI HERALD, Oct. 27, 1994, at 21A. After later court orders, twenty-two of the twenty-three Cuban refugees originally on board took another flight out of Guantánamo and repatriated. Somehow—on foot or by swimming—the missing passenger had escaped his camp. See *Lawyers Fly To Guantánamo To Gather Evidence*, MIAMI HERALD, Nov. 8, 1994, at 12A; 85 *Cuban Refugees Flee Guantánamo; 46 Are Recaptured*, MIAMI HERALD, Nov. 7, 1994, at 17A.

<sup>113</sup> Order Granting Plaintiffs’ Emergency Motion for Temporary Restraining Order at 13, CABA v. Christopher, No. 94-CV-2183 (S.D. Fla. Oct. 31, 1994) (No. 44).

<sup>114</sup> See 85 *Cuban Refugees Flee Guantánamo; 46 Are Recaptured*, MIAMI HERALD, Nov. 7, 1994, at 17A; Andres Viglucci, *Judge Lifts Orders Halting Repatriations Ruling Affects 1,000 Cuban Detainees*, MIAMI HERALD, Nov. 4, 1994, at 1A; Karen Branch, *Guantánamo Cubans’ Patience Thin*, MIAMI HERALD, Oct. 20, 1994, at 18A.

<sup>115</sup> See 85 *Cuban Refugees Flee Guantánamo; 46 Are Recaptured*, MIAMI HERALD, Nov. 7, 1994, at 17A; Andres Viglucci, *Judge Lifts Orders Halting Repatriations Ruling Affects 1,000 Cuban Detainees*, MIAMI HERALD, Nov. 4, 1994, at 1A. One military commander became so frustrated by the unrest and danger that he moved his camps closer to the sovereign Cuba border, thereby making escape attempts safer. See Joanne Cavanaugh, *Guantánamo Detainees Divided Over Lawsuits Some Cubans Don’t Want The Help; They Want To Go Home*, MIAMI HERALD, Nov. 3, 1994, at 1A.

<sup>116</sup> Motion for Summary Reversal, or, in the Alternative, for an Emergency Stay Pending Appeal at 7, CABA v. Christopher, 43 F.3d 1412 (11th Cir. 1995) (quoting Declaration of Jay LaRoche, Field Office Director, Miami Operations of the Community Relations Service); see also Andres Viglucci, *Judge Lifts Orders Halting Repatriations Ruling Affects 1,000 Cuban Detainees*, MIAMI HERALD, Nov. 4, 1994, at 1A.

<sup>117</sup> Order by the Court at 2, CABA v. Christopher, 43 F.3d 1412 (11th Cir. 1995).

<sup>118</sup> Telephone interview with Randy Beardsworth, Catalyst Partners (July 22, 2011).

tion.<sup>119</sup> Although the court lifted Judge Atkins' complete ban on repatriations, it maintained the ban for the vast majority of refugees.

The same day the Eleventh Circuit issued its order permitting visits to the camps, plaintiffs' attorneys flew from South Florida to Guantánamo Bay.<sup>120</sup> The U.S. government imposed restrictions on all such counsel visits.<sup>121</sup> For each trip, a handful of attorneys could stay on the base for only two days, and the military bused in refugees from the camps to base offices.<sup>122</sup> Attorneys met refugees in musty rooms with poor lighting and weak fans for ventilation.<sup>123</sup> The attorneys complained that, on several occasions, the military delayed scheduled meetings with refugees or failed to produce the refugees altogether.<sup>124</sup> One attorney's impression upon landing in Guantánamo was that the refugee area "looked like a concentration camp, with towers and flood lights."<sup>125</sup>

The visits proceeded nonetheless, and the attorneys interviewed as many refugees as they could in whatever space the military provided.<sup>126</sup> They aimed to gather evidence showing that repatriations were coerced and

<sup>119</sup> Order by the Court at 2, *CABA v. Christopher*, 43 F.3d 1412 (11th Cir. 1995).

<sup>120</sup> See *Lawyers Fly To Guantánamo To Gather Evidence*, MIAMI HERALD, Nov. 8, 1994, at 12A. The planes were provided by Brothers to the Rescue ("Hermanos al Rescate"), which describes itself as a "U.S.-based organization supporting through active nonviolence the efforts of the Cuban people to free themselves from dictatorship." Brothers to the Rescue website, available at <http://www.hermanos.org/>.

<sup>121</sup> See, e.g., Letter from Lieutenant Colonel Harris to CABA attorneys (Nov. 16, 1994) (denying access to refugee camps) (on file with author); Letter from Roberto Martínez to Seth Waxman, Associate Deputy Attorney General, U.S. Department of Justice (Nov. 15, 1994) (complaining that government had denied attorneys access to refugee camps) (on file with author); Letter from Roberto Martínez to Seth Waxman, Associate Deputy Attorney General, U.S. Department of Justice (Nov. 22, 1994) (reiterating complaints and requesting access) (on file with author).

<sup>122</sup> See Orlando J. Cabrera, Attorney, Memorandum re: Diary of Events at the United States Naval Base at Guantánamo Bay, Cuba November 7 to November 10, 1994 (Nov. 13, 1994) (describing visit to base) (on file with author); Letter from Lieutenant Colonel Harris to CABA attorneys (Nov. 16, 1994) (describing office space) (on file with author).

<sup>123</sup> See Orlando J. Cabrera, Attorney, Memorandum re: Diary of Events at the United States Naval Base at Guantánamo Bay, Cuba November 7 to November 10, 1994 (Nov. 13, 1994) (on file with author); Notes of Marcos Jiménez, Attorney (on file with author).

<sup>124</sup> See Orlando J. Cabrera, Attorney, Memorandum re: Diary of Events at the United States Naval Base at Guantánamo Bay, Cuba November 7 to November 10, 1994 (Nov. 13, 1994) ("it bothered me that they were never brought to us despite two assurances that they would be") (on file with author); Salvador G. Longoria, Summary re: Visit to Guantánamo, November 21-23, 2004 (noting that attorneys were "not brought any refugees for approximately two hours") (on file with author); cf. Letter from Lieutenant Colonel Harris to CABA attorneys (Nov. 16, 1994) (explaining potential "delays in providing the persons who have asked to see you") (on file with author).

<sup>125</sup> Interview with Marcos Jiménez, Attorney, Kasowitz Benson Torres & Friedman, in Miami, Fla. (July 26, 2011).

<sup>126</sup> On November 16, 1994, Frank Angones, Marcos Jiménez, and five other plaintiffs' attorneys traveled from Fort Lauderdale to Guantánamo Bay on Air Sunshine, a small private carrier offering daily flights to the naval base. On board was Marcos Jiménez' younger brother, Frank, an attorney who had studied at Yale Law School under Dean Koh and later became General Counsel of the Navy—with command over Guantánamo Bay.

that all 33,000 refugees deserved direct entry into the United States.<sup>127</sup> So began a series of extraordinary interviews and writings in Guantánamo.

Throughout November and December 1994, thousands of Cuban refugees signed requests for legal advice and representation.<sup>128</sup> The requests were both formal and emotional, completing the business of requesting counsel while striving to convey the desperation of detention.<sup>129</sup> Many refugees were skilled laborers and professionals—licensed in economics, mechanics, geography, history, and civil engineering<sup>130</sup>—but all were *balseros* in their minds and in formal documents. One refugee, Jesús Blanco Caraballo, had fled Castro’s Cuba after being detained in Brisas del Mar, a scenic beach town just west of Havana. Translated as “Sea Breezes,” the name of this detention location provides a poignant metaphor for freedom.<sup>131</sup>

These thousands of papers are richly descriptive of the refugees’ lives in Cuba, reasons for leaving, and hopes for freedom in the United States. Many requests include a clear statement of why the refugees fled: to escape the oppression of the Castro regime. As one refugee explained, “I left Cuba because of the Cuban government authorities.”<sup>132</sup> Other requests include a blunt statement of what they sought in the United States: “. . . I was in search of freedom.”<sup>133</sup>

In their requests for counsel, many *balseros* also explained why the choice the U.S. government offered—either stay in Guantánamo or repatriate to Cuba—put them in an impossible position. As former officials or dissidents under Castro’s regime, some feared persecution upon repatriation. One refugee was a “member of the Ministry of the Interior” and “for that reason, there is no way I can return to my country.”<sup>134</sup> Another described the “political persecution” he suffered, writing that “[i]n Cuba I am forced by the police chief to throw myself in a raft because I do not agree with the

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<sup>127</sup> See *Lawyers Fly To Guantánamo To Gather Evidence*, MIAMI HERALD, NOV. 8, 1994, at 12A. The attorneys found it difficult to “remain unemotional and/or merely factual when recounting the experiences of Guantánamo.” Salvador G. Longoria, Summary re: Visit to Guantánamo, November 21-23, 2004 (on file with author).

<sup>128</sup> Counsel requests of Guantánamo refugees (“Solicitud para Asesoría Legal” or “Petición de Representación Jurídica”) (copies on file with author).

<sup>129</sup> See *id.*

<sup>130</sup> Counsel Request of Guantánamo refugees (Nov. 30, 1994) (“Lic. Economía,” “Ing. Mecánico,” “Lic. Geografía,” “Lic. Historia,” “Ing. Civil”) (on file with author). These professional titles appear in a request handwritten on yellow paper from Camp India, followed by a list of nearly 200 names and signatures. The request is signed “in ‘Guantánamo Bay’ Cuba. Territory of the United States.”

<sup>131</sup> Letter from Jesús Blanco Caraballo, Guantánamo refugee, to CABA attorneys (“Estimado Abogado”) (Dec. 30, 1994) (on file with author).

<sup>132</sup> Counsel Request of Mario Luis Fernández Martínez, Guantánamo refugee No. 001 036 284 (1994) (“Yo deseo ser defendido y entrevistado por un abogado Cubano-Americano de Miami. \*Viaje de Cuba por causa de las autoridades del gobierno cubano.”) (on file with author).

<sup>133</sup> Counsel Request from Hector Medina Diaz, Guantánamo refugee No 000 833 057, to Osvaldo Soto, attorney (1994) (“ya que salí en busca de libertad”) (on file with author).

<sup>134</sup> Counsel Request from Hector Medina Diaz, Guantánamo refugee No 000 833 057, to Osvaldo Soto, attorney (1994) (“miembro del Ministerio del Interior”; “por lo cual le comunico que no puedo regresar a mi país”) (on file with author).

politics of Castro.”<sup>135</sup> Castro’s warm pledge that he would receive home all Guantánamo refugees without reprisals, while apparently acceptable to the United States, did nothing to comfort the refugees who had lived under his regime.

Most poignant, many refugees wrote of their distress and bewilderment at their current detention by U.S. officials: “They have locked me up like a vulgar delinquent, which I am not . . . I do not understand this brutal incarceration and I do not know how long I can stand it.”<sup>136</sup> They sought representation to obtain relief from the United States’ own “violation of human rights.”<sup>137</sup> One request, written in flowing script, invokes basic human rights, decrying this “betrayal of human principles.”<sup>138</sup> The refugees also expressed concern that, while they waited “locked up” in Guantánamo camps, detainees who committed felony crimes were rumored to be transferred to the United States and prosecuted under domestic laws.<sup>139</sup>

Despite the accumulation of written requests for counsel and the Eleventh Circuit’s order permitting refugee visits, *CABA* attorneys continued to encounter resistance at the base. The government insisted on keeping attorneys in base offices and busing in refugees for interviews, and it made no secret of its position: “You will not be granted access to the camps.”<sup>140</sup> Undeterred, the attorneys traveled to Guantánamo for several more months, interviewing refugees and gathering evidence for the lawsuit.

## 2. *Intervention of Haitian Refugee Plaintiffs*

On October 31, 1994, one week after *CABA* plaintiffs filed their complaint, attorneys from the Haitian Refugee Center representing the 12,000

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<sup>135</sup> Counsel Request of Raul Daniel Arenas, Guantánamo refugee No. 000 048 346 (1994) (“un perseguido político”; “en Cuba fui obligado por el jefe de la policía a tirarme [sic] en una balsa por no estar de acuerdo con la política de Castro”) (on file with author).

<sup>136</sup> Counsel Request from Hector Medina Diaz, Guantánamo refugee No 000 833 057, to Osvaldo Soto, attorney (1994) (“me han encerrado como un vulgar delincuente, lo cual no soy. . . . No entiendo este brutal encierro y no sé hasta dónde podré soportarlo.”) (on file with author).

<sup>137</sup> Counsel Request of Luis Martínez Leon, Guantánamo refugee No. 000575561, Jose A. Martínez Belsuzardo, Guantánamo refugee No. 000 529 858, and Mario L. Fernandez Martínez, Guantánamo refugee No. 001036284 (1994) (“violación de los derechos humanos”) (on file with author).

<sup>138</sup> Letter from Heriberto Caballero Ponciano, Ingeniero Industrial and “Refugiado (sin status),” to *CABA* attorneys (Dec. 1, 1994) (“traición a los principios de la humanidad”) (on file with author).

<sup>139</sup> Counsel Request from Hector Medina Diaz, Guantánamo refugee No 000 833 057, to Osvaldo Soto, attorney (1994) (on file with author); see Orlando J. Cabrera, Attorney, Memorandum re: Diary of Events at the United States Naval Base at Guantánamo Bay, Cuba November 7 to November 10, 1994 (Nov. 13, 1994) (on file with author).

<sup>140</sup> Letter from Lieutenant Colonel Harris to *CABA* attorneys (Nov. 16, 1994) (on file with author); accord Letter from Roberto Martínez to Seth Waxman, Associate Deputy Attorney General, U.S. Department of Justice (Nov. 15, 1994) (on file with author); Letter from Roberto Martínez to Seth Waxman, Associate Deputy Attorney General, U.S. Department of Justice (Nov. 22, 1994) (on file with author).

Haitians in Guantánamo successfully moved to intervene in the litigation.<sup>141</sup> In addition to permitting intervention, Judge Atkins granted the Haitian Refugee Center access to the Haitian plaintiffs in Guantánamo and to "any other Haitian detainees who request counsel in writing"; ordered Attorney General Reno to parole from safe haven unaccompanied Haitian minors in the same manner as unaccompanied Cuban minors; and ordered the U.S. government to provide the names of Haitian detainees.<sup>142</sup>

The Haitian Refugee Center injected a new constitutional claim in the litigation: a Fifth Amendment equal protection violation on the basis that Haitian children in Guantánamo camps were being treated less favorably than Cuban children.<sup>143</sup> It claimed that the Attorney General could not parole Cuban unaccompanied minors into the United States while leaving Haitian unaccompanied minors to languish in camps.<sup>144</sup>

Judge Atkins subsequently stayed his order, but still permitted the Haitian Refugee Center access to any Haitian refugees who requested legal counsel.<sup>145</sup> The government appealed, and on December 1, 1994, the Eleventh Circuit consolidated the cases. Four months into the Cuban rafter crisis, the appellate court now had control of the entire matter.

### B. *Relief Denied on Appeal*

On January 18, 1995, the Eleventh Circuit issued its opinion. Significantly, the court described the Cuban and Haitian refugees as "migrants" "temporarily provided safe haven" in Guantánamo and their "residency" conditions as "difficult" yet hopeful, fortified by the "concern" of *pro bono* attorneys and the "goodwill" of "military rescuers and caretakers."<sup>146</sup> This language was a break from that used at the trial level, as Judge Atkins' orders had consistently described the Cubans and Haitians in Guantánamo as detained refugees.<sup>147</sup> Yet, the language was consistent with that used by White House officials: Cubans in Guantánamo were not refugees in detention; they

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<sup>141</sup> See *CABA*, 43 F.3d at 1420.

<sup>142</sup> Order on Provisional Intervenor's Motion for Temporary Restraining Order at 1-2, *CABA v. Christopher*, No. 94-CV-2183 (S.D. Fla. Nov. 22, 1994) (No. 143).

<sup>143</sup> See 43 F.3d at 1427.

<sup>144</sup> See *id.*

<sup>145</sup> Omnibus Order at 3, *CABA v. Christopher*, 43 F.3d 1412 (11th Cir. 1995).

<sup>146</sup> 43 F.3d at 1430.

<sup>147</sup> See, e.g., Order Granting Plaintiffs' Emergency Motion for Temporary Restraining Order at 4, *CABA v. Christopher*, No. 94-CV-2183 (S.D. Fla. Oct. 31, 1994) (No. 44) ("The issue is whether the detained plaintiff refugees . . . are entitled to advice of counsel to assure their 'voluntary' decision to repatriate.").

were always free to leave.<sup>148</sup> And it foreshadowed the result on appeal. The Eleventh Circuit reversed, denying the refugees constitutional rights.<sup>149</sup>

The Eleventh Circuit considered three issues: (1) "[w]hether the Cuban or Haitian migrants in safe haven outside the physical borders of the United States have any cognizable statutory or constitutional rights," including due process; (2) whether the attorneys have a First Amendment right to free association, such that the U.S. government must allow access to the camps; and (3) whether the Haitian refugees have equal protection rights and the Haitian Refugee Center has a First Amendment right to free association.<sup>150</sup> The key to all these issues was the assertion of constitutional rights on behalf of the refugees, individuals who were not U.S. citizens and who were outside U.S. borders. Any rights of the attorneys would be predicated on those underlying claims, as the Eleventh Circuit had previously held that a lawyer's First Amendment right to associate with a client is narrow and "is predicated upon the existence of an underlying legal claim that may be asserted by the potential litigant."<sup>151</sup> The government's litigation position was succinct: "the people, the Cubans who are in safe haven at Guantánamo, are without rights under our Constitution."<sup>152</sup>

The Eleventh Circuit dissolved Judge Atkins' preliminary injunction, finding that the Cuban and Haitian plaintiffs could not show a substantial likelihood of success on the merits.<sup>153</sup> Put simply, the court held that these "migrants in safe haven outside the physical borders of the United States" had no "cognizable statutory or constitutional rights."<sup>154</sup>

Analyzing the legal nature of Guantánamo Bay, the Eleventh Circuit found that, although the United States exercises perpetual control and jurisdiction over Guantánamo, it was not U.S. territory nor "functionally

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<sup>148</sup> See Memorandum from Jorge L. Hernandez-Toranzo to Comm. for Freedom of Guantánamo Detainees (Oct. 18, 1994) (on file with author); cf. Defendants' Opposition to Plaintiffs' Motion for Class Certification at 1, *CABA v. Christopher*, No. 94-CV-2183 (S.D. Fla. Nov. 2, 1994) (No. 85) (*CABA* complaint "challeng[es] the government's actions surrounding the alleged detention and forced repatriation of Cuban migrants").

<sup>149</sup> 43 F.3d at 1417, 1430.

<sup>150</sup> *Id.* at 1421.

<sup>151</sup> See *Haitian Refugee Center, Inc.*, 953 F.2d at 1513; see also *CABA*, 43 F.3d at 1429.

<sup>152</sup> Transcript of Hearing on Application for Temporary Restraining Order at 73, *CABA v. Christopher*, No. 94-CV-2183 (S.D. Fla. Oct. 26, 1994) (No. 26) (statement of Allen W. Hausman, Chief, Civil Division, U.S. Department of Justice, Office of Immigration Litigation). The phrase, "in safe haven at Guantánamo," was key to the government's position and underscored the unusual legal nature of the naval base outside U.S. borders. Within U.S. borders, non-U.S. citizens enjoy considerable constitutional rights. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 211-12 (1982) (applying Equal Protection Clause to illegal immigrants and recognizing that Fourteenth Amendment provisions "are universal in their application, to all persons within the territorial jurisdiction") (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (applying Fifth Amendment protections from federal government discrimination to illegal immigrants); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (finding resident alien is a Fifth Amendment "person"); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (finding resident aliens have First Amendment rights).

<sup>153</sup> 43 F.3d at 1424.

<sup>154</sup> *Id.* at 1430.

equivalent” to land within U.S. borders.<sup>155</sup> Extending prior case decisions denying rights to Haitian refugees intercepted on the high seas, the Eleventh Circuit did not allow these new refugees in Guantánamo to invoke due process or any other constitutional or statutory protections.<sup>156</sup>

The court addressed the constitutional questions grudgingly, apparently hoping to avoid them altogether, but finding itself forced to address (and dispense with) such questions “urged upon us” by plaintiffs’ inability to invoke statutory rights.<sup>157</sup> These questions arose in the context of plaintiffs’ claim of a Fifth Amendment “due process right to obtain and communicate with legal counsel of their choice regarding asylum application or parole in order to protect an interest against being wrongly repatriated from safe haven.”<sup>158</sup> The Eleventh Circuit observed that one of its sister courts—the Second Circuit in *Haitian Centers Council, Inc. v. McNary*<sup>159</sup>—had recently found that, when the government “screens in” a migrant to determine if that person is a refugee, such “screening in” creates a liberty interest to which due process attaches.<sup>160</sup> The Eleventh Circuit, however, declined to take a position on the possibility of such due process attachment for the Cuban and Haitian “migrants” in Guantánamo.<sup>161</sup> The court’s position in any event would have been dicta, as the court found that no screening had occurred.<sup>162</sup> Rather, the Clinton administration had made the strategic decision not to offer preliminary refugee determination interviews.<sup>163</sup> Whatever processing had occurred when the migrants were brought to Guantánamo, it was distinct from “screening.”<sup>164</sup>

According to the Eleventh Circuit, all the U.S. government had done was act graciously, as a privileged host moved by *noblesse oblige* to welcome in one less fortunate than himself: “[p]roviding safe haven residency is a *gratuitous humanitarian act* which does not in any way create even the putative liberty interest in securing asylum processing that the Second Circuit found that initial screening creates.”<sup>165</sup> The mere act of “bringing the migrants to safe haven” did not give rise to “any protectable liberty or prop-

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<sup>155</sup> *Id.* at 1425.

<sup>156</sup> *Id.*; see *Sale*, 509 U.S. at 187-88; *Haitian Refugee Center, Inc.*, 953 F.2d at 1511-13; *Haitian Refugee Center, Inc.*, 950 F.2d at 687.

<sup>157</sup> 43 F.3d at 1425 (“Because the Cuban Legal Organizations and HRC [Haitian Refugee Center] struggle to re-assert statutory claims foreclosed by *HRC II* and *Sale v. Haitian Ctrs. Council, Inc.* and fail to assert new meritorious statutory claims, we reach the constitutional issues as well.”) (internal citation omitted).

<sup>158</sup> *Id.* at 1426.

<sup>159</sup> 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993).

<sup>160</sup> 43 F.3d at 1427.

<sup>161</sup> See *id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 1426.

<sup>164</sup> *Id.* at 1427.

<sup>165</sup> *Id.* (emphasis added). There is a common law argument, at least, for reasonable treatment when gratuitously undertaking the humanitarian task of receiving and sheltering an individual on one’s land. See, e.g., 40A AM. JUR. 2D *Hotels, Motels, Etc.* § 70 (2011) (hotel that undertakes to protect and give aid to guests has a duty to exercise reasonable care).



erty interest against being wrongly repatriated.”<sup>166</sup> These “migrants” could be shipped home tomorrow without due process protection or recourse, if ever the government chose to act in a less gratuitous or less humanitarian fashion.<sup>167</sup> Without due process protection, the “migrants” had no basis on which to “rest a claim of right of counsel and information.”<sup>168</sup>

The Eleventh Circuit applied a similar analysis to the Haitian minors’ claim of equal protection under the Fifth Amendment.<sup>169</sup> The court held that the children had no Fifth Amendment rights to challenge the government’s exercise of parole discretion or any other decision.<sup>170</sup> Noting that the Supreme Court had previously declined to apply the Fourth and Fifth Amendments extraterritorially in *United States v. Verdugo-Urquidez*<sup>171</sup> and *Johnson v. Eisentrager*,<sup>172</sup> respectively, the Eleventh Circuit concluded that “aliens who are outside the United States cannot claim rights to enter or be paroled into the United States based on the Constitution.”<sup>173</sup>

Thus, the Cuban and Haitian refugees in Guantánamo and Panamá camps were judicially declared to be migrants standing outside U.S. territory “without legal rights that are cognizable in the United States.”<sup>174</sup> In the Eleventh Circuit’s opinion, there is little mention of hardship in the refugee camps. Rather, while nodding in the direction of “difficult conditions,”<sup>175</sup> the court described a “safe haven” in the true sense of that phrase: a place of refuge or security.<sup>176</sup> Just as White House officials had told *CABA* plaintiffs before litigation, the U.S. government did not want to “maintain these migrants for an indefinite period of time or against their will.”<sup>177</sup> And in the Eleventh Circuit’s view, the migrants had real options. They could stay in safe haven, voluntarily repatriate to Cuba and seek asylum in the United States through appropriate channels, or settle in a welcoming third country.<sup>178</sup> The migrants were “beneficiaries of the American tradition of humanitarian concern and conduct,” receiving the military’s “goodwill” to “hopefully sustain and reassure them in their quest for a better life.”<sup>179</sup> In

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<sup>166</sup> 43 F.3d at 1427.

<sup>167</sup> See *id.* at 1427, 1429-30.

<sup>168</sup> *Id.* at 1427.

<sup>169</sup> See *id.* at 1427-29.

<sup>170</sup> *Id.* at 1429.

<sup>171</sup> 494 U.S. 259, 274-75 (1990) (rejecting Fourth Amendment rights over search and seizure by United States agents of Mexican citizen’s property in Mexico).

<sup>172</sup> 339 U.S. 763, 784 (1950) (rejecting Fifth Amendment rights for German nationals who had been convicted in China of activities against the United States and repatriated to Germany for imprisonment).

<sup>173</sup> 43 F.3d at 1428-29.

<sup>174</sup> *Id.* at 1430.

<sup>175</sup> *Id.*

<sup>176</sup> MERRIAM-WEBSTER ONLINE DICTIONARY, Entry for “haven” (2011), available at <http://www.merriam-webster.com/dictionary/haven>.

<sup>177</sup> 43 F.3d at 1418; see Memorandum from Jorge L. Hernandez-Toraño to Comm. for Freedom of Guantanamo Detainees (Oct. 18, 1994) (on file with author).

<sup>178</sup> 43 F.3d at 1418.

<sup>179</sup> *Id.* at 1430.

the end, the solution to the migrants’ problem was better “addressed by the legislative and executive branches.”<sup>180</sup>

The CABA appealed to the U.S. Supreme Court, but the Court denied their petition for writ of certiorari.<sup>181</sup> The refugees were left to seek help outside the court system, which they ultimately did by obtaining parole as an appropriate outcome in the political sphere.<sup>182</sup>

That was Guantánamo in the mid-1990s. Then things changed, and later Guantánamo lawsuits provided a new lens revealing CABA as an appropriate outcome in the judicial sphere.

### III. POST-9/11: ENEMY COMBATANTS IN GUANTÁNAMO

In the early 2000s, everything changed. We were attacked on U.S. soil on September 11, 2001. President Bush launched the War on Terror. U.S. military forces invaded Afghanistan and Iraq. U.S. soldiers captured individuals in those and other foreign countries, and the Bush administration labeled them “unlawful enemy combatants.”<sup>183</sup> Military officials brought these enemy combatants to Guantánamo Bay, Cuba, and detained them in prisons. We entered a new historical moment, which introduced a new judicial outlook on familiar constitutional issues.

The courts’ analysis of Guantánamo detainees became infused with post-9/11 sentiment and shifted from looking at *where* the detainees were to casting a critical eye on *who* they were. No longer were “migrants” fleeing oppressive homelands hoping to reach the United States for freedom and choosing temporary residence in Guantánamo camps. Now the naval base held enemy combatants captured in war zones who sought to kill Americans and destroy the very idea of America as a symbol of Western values, modernity, and freedom.

One might think that this shift in hostilities would solidify the lack of rights for Guantánamo detainees. The government apparently thought so, as it transferred foreigners apprehended abroad to a U.S.-controlled area that had been declared in CABA to be beyond constitutional reach for non-U.S. citizens.<sup>184</sup> There was no reason to think that this new group of captives arriving in Guantánamo would be treated differently. After all, why grant

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<sup>180</sup> *Id.*

<sup>181</sup> CABA v. Christopher, 516 U.S. 913 (1995).

<sup>182</sup> See discussion *infra* Section V.

<sup>183</sup> See 10 U.S.C. § 948a(1) (“(A) The term ‘unlawful enemy combatant’ means—(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.”); see also Deputy Secretary, U.S. Dep’t of Defense, Order Establishing Combatant Status Review Tribunal (July 7, 2004) at 1.

<sup>184</sup> See CABA, 43 F.3d at 1424-25, 1430.

enemy combatants constitutional rights when refugees had been denied those rights? Yet, the Supreme Court did just that.

A. *Boumediene*: “Designated as Enemy Combatants and Detained”

On June 12, 2008, the Supreme Court decided *Boumediene v. Bush* and held that certain constitutional protections, specifically the writ of habeas corpus under the Suspension Clause, do apply to enemy combatants detained in Guantánamo.<sup>185</sup> As an emblem of British legal history, the writ of habeas corpus long predates the U.S. Constitution and indeed came into being to enforce the promises of the Magna Carta.<sup>186</sup> The Suspension Clause protects this ancient writ, providing that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>187</sup> Any withdrawal of the constitutional privilege of habeas corpus must conform to this clause. While the CABA had invoked Fifth Amendment Due Process rather than the Suspension Clause, the Eleventh Circuit concluded in sweeping fashion that they lacked “cognizable . . . constitutional rights.”<sup>188</sup> Even limiting *Boumediene* to habeas corpus relief, the case serves as a guide on the larger question of the Constitution’s reach to Guantánamo, which had been denied in *CABA*.

*Boumediene* continued a series of Guantánamo detainee cases that the Supreme Court had been deciding in rapid succession since the attacks of September 11, 2001. The transformation of the Guantánamo Bay naval base pressed these cases upon the Court. Soon after the attacks, the U.S. military opened prisons in Guantánamo specifically to hold alleged terrorists, many of whom were suspected to be members of al Qaeda and the Taliban.<sup>189</sup> Over the following few years, the base held nearly 800 prisoners.<sup>190</sup> By the

<sup>185</sup> 553 U.S. 723 (2008).

<sup>186</sup> See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218-19 (1953) (Jackson, J., dissenting) (“Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land.”); BLACK’S LAW DICTIONARY 322 (3d pocket ed. 2006) (habeas corpus writ is “employed to bring a person before a court, most frequently to ensure that the person’s imprisonment or detention is not illegal”).

<sup>187</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>188</sup> 43 F.3d at 1421; see *id.* at 1430. The interplay between the Due Process and Suspension Clauses is a topic of recent and interesting commentary. See Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantánamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due Process*, U. PENN. J. CONST. L. (forthcoming).

<sup>189</sup> See Walter Pincus, *Powell Calls for Closure of Military Prison at Guantánamo*, WASH. POST, Jun. 11, 2007, at A03.

<sup>190</sup> See *Guantánamo Bay Naval Base (Cuba)*, N.Y. TIMES, Apr. 25, 2011, available at <http://topics.nytimes.com/top/news/national/usstatesterritoriesandpossessions/guantanamobaynavalbasecuba/index.html?scp=1-spot&sq=guantanamo%20bay%20naval%20base&st=cse> (“Of the 779 people who have been detained at the United States military prison at Guantánamo, 600 have been transferred and 171 remain . . .”).

end of 2008, just after the Supreme Court issued its opinion in *Boumediene*, Guantánamo held approximately 250 prisoners.<sup>191</sup>

The scale of the detainee population was significantly smaller than a decade prior, during the *balseiros* crisis that saw 33,000 Cuban rafters descend on Guantánamo. But detention was more difficult for the obvious reason that prisons had replaced tent camps. Enemy combatant prisoners were alone in windowless cells, and several launched hunger strikes and attempted suicide.<sup>192</sup> Confinement conditions pushed many “to the edge,” according to Amnesty International.<sup>193</sup> Unlike migrant camps built amid the small-town feel of downtown Guantánamo, the prisons were isolated and distant. While the White House and the military viewed the housing of rafters as humanitarian and voluntary, they viewed these post-9/11 detentions as “decidedly not humanitarian.”<sup>194</sup> They were also decidedly not voluntary. The military now had a law enforcement function.<sup>195</sup>

Facing a new, urgent set of unlawful imprisonment claims from Guantánamo, the Supreme Court quickly carved out a new line of detainee jurisprudence, notably protective of the detainees and irritating to Congress. On the same day in 2004, the Court decided both *Hamdi v. Rumsfeld*<sup>196</sup> and *Rasul v. Bush*,<sup>197</sup> predecessors to *Boumediene* and landmark decisions in the Court’s emerging post-9/11 case law.

*Hamdi* presented the strongest case for constitutional protections, as the petitioner was a U.S. citizen held on U.S. soil.<sup>198</sup> Yaser Esam Hamdi had been captured in Afghanistan as an enemy combatant fighting for the Taliban and transferred from Guantánamo to naval brigs in Norfolk, Virginia, and Charleston, South Carolina.<sup>199</sup> In a plurality opinion, the Supreme Court ruled that the government could detain a U.S. citizen apprehended in a foreign country as an enemy combatant.<sup>200</sup> In a near-unanimous opinion, the Court further held that such a detainee must be given at least minimal due process. Specifically, “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his

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<sup>191</sup> News Release, U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), Detainee Transfer Announced (Dec. 16, 2008).

<sup>192</sup> See Josh White, *Guantánamo Desperation Seen in Suicide Attempts; One Incident Was During Lawyer’s Visit*, WASH. POST, Nov. 1, 2005, at A01.

<sup>193</sup> *Guantánamo Conditions ‘Worsening’*, BBC NEWS, April 4, 2007, available at <http://news.bbc.co.uk/2/hi/americas/6526589.stm>.

<sup>194</sup> E-mail from Randy Beardsworth, Catalyst Partners, to author (July 17, 2011) (on file with author).

<sup>195</sup> Southern Command Joint Task Force-Guantánamo joined the naval base after 9/11 “to accomplish detainee operations in the War on Terror.” United States Navy Fact File, Naval Station Guantánamo Bay, Cuba (Nov. 8, 2011).

<sup>196</sup> 542 U.S. 507 (2004).

<sup>197</sup> 542 U.S. 466 (2004).

<sup>198</sup> 542 U.S. at 510. Petitioner Hamdi’s father filed the writ of habeas corpus on his behalf. The contrast between *Hamdi* and *CABA* is particularly stark, as the *CABA* plaintiffs were neither U.S. citizens, nor on U.S. soil, nor enemy combatants.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 519 (“There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”).

classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."<sup>201</sup>

*Rasul* raised more difficult questions, as petitioners were neither U.S. citizens nor detained on U.S. soil. Rather, petitioners were foreign nationals who had been captured abroad in battles between U.S. forces and the Taliban and later detained in Guantánamo prisons.<sup>202</sup> Invoking the federal habeas statute,<sup>203</sup> they sought judicial review of their detention.<sup>204</sup> The D.C. District Court dismissed the cases, holding that federal courts lacked jurisdiction to hear such habeas petitions.<sup>205</sup> Following the Eleventh Circuit's lead, the trial court noted that "*Cuban American Bar Association* stands for the proposition that the military base at Guantánamo Bay is not within the territorial jurisdiction of the United States simply because the United States exercises jurisdiction and control over that facility."<sup>206</sup> The D.C. Circuit Court affirmed dismissal and also relied on *CABA*, observing that "[t]he Eleventh Circuit there rejected the argument—which the detainees make in this case—that with respect to Guantánamo Bay 'control and jurisdiction' is equivalent to sovereignty."<sup>207</sup>

The Supreme Court in *Rasul* reversed, holding that the Guantánamo detainees did have statutory entitlement to habeas review.<sup>208</sup> The Court based its holding on the "exclusive jurisdiction and control" of the United States over Guantánamo, the petitioners' lack of any proceeding or process, and the fact that petitioners sought a statutory rather than constitutional "right to federal habeas review."<sup>209</sup> The high court ignored the lower courts' reliance on *CABA*, omitting any citation to the case.

Congress responded to *Rasul* by passing the Detainee Treatment Act of 2005, stripping federal courts of jurisdiction to hear habeas petitions from Guantánamo prisoners.<sup>210</sup> The following year, the Supreme Court in

<sup>201</sup> *Id.* at 533; see also *id.* at 538-39 (remanding for determination of specific due process requirements). Only Justice Thomas dissented on this point.

<sup>202</sup> As in *Hamdi*, petitioners' parents filed the *Rasul* litigation: the father of an Australian detainee, the father of a British detainee, and the mother of another British detainee. See *Al Odah*, 321 F.3d at 1136-37. By the time of the Supreme Court's decision, the petitioners held in Guantánamo comprised two Australian citizens and twelve Kuwaiti citizens. See *Rasul*, 542 U.S. at 470. Lead Petitioner Shafiq Rasul was a British citizen who had been repatriated to the United Kingdom a few months earlier; British authorities released him without charge. See *id.* at 470-71 n.1.

<sup>203</sup> See 28 U.S.C. § 2241(a), (c)(3) (granting federal district courts authority to hear habeas corpus applications by any person "in custody in violation of the Constitution or laws or treaties of the United States").

<sup>204</sup> 542 U.S. at 475.

<sup>205</sup> *Rasul v. Bush*, 215 F. Supp. 2d 55, 57, 73 (D.D.C. 2002), *aff'd sub nom.*, *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom.*, *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>206</sup> *Id.* at 72.

<sup>207</sup> 321 F.3d at 1143, 1145.

<sup>208</sup> 542 U.S. at 483-84. The Supreme Court found that "[n]o party questions" that the district court could exercise jurisdiction over the Guantánamo detainees' custodians, which was sufficient under 28 U.S.C. § 2241. *Id.*

<sup>209</sup> *Id.* at 476, 478.

<sup>210</sup> Pub. L. No. 109-148, 199 Stat. 2680 (2005).

*Hamdan v. Rumsfeld* ruled that this Act did not apply retroactively to petitions already pending.<sup>211</sup> Accordingly, the Court heard the habeas appeal in front of it from petitioner Salim Ahmed Hamdan.<sup>212</sup> Hamdan was a Yemeni citizen captured in Afghanistan whom the government determined to be a member of al Qaeda engaged in terrorist activities, including serving as Osama bin Laden’s bodyguard and driver.<sup>213</sup> President Bush had ordered that Hamdan’s case, along with a handful of other detainees’ cases, be tried in Guantánamo by a military tribunal, with the appointment of military counsel.<sup>214</sup> Hamdan filed a habeas petition challenging the lawfulness of this tribunal.<sup>215</sup> The Supreme Court ruled in Hamdan’s favor, finding that the Bush administration’s convening of military commissions was neither authorized by congressional act, nor consistent with the Uniform Code of Military Justice, nor in harmony with the Geneva Convention.<sup>216</sup> It appeared at this point that the Guantánamo detainees could look to the federal courts for relief.

Congress quickly responded by passing the Military Commissions Act of 2006, again stripping federal courts of jurisdiction to hear habeas petitions from enemy combatants in Guantánamo,<sup>217</sup> but making clear that the Act applied to petitions “pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.”<sup>218</sup> This “ongoing dialogue between and among the branches of Government” set the stage for *Boumediene*.<sup>219</sup>

Two years later, in *Boumediene*, the Supreme Court recognized the Guantánamo detainees’ right under the Constitution to assert habeas corpus.<sup>220</sup> The Court continued its streak of extending legal protections in arguably the weakest case for relief: application of constitutional habeas privileges to non-U.S. citizens captured and detained outside U.S. borders. The opinion opens with a telling line: “Petitioners are aliens designated as enemy combatants and detained at the United States Naval Station at Guantánamo Bay, Cuba.”<sup>221</sup> Immediately, with the phrase, “designated as enemy combatants and detained,” the judiciary recognized a distinct world from the

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<sup>211</sup> 548 U.S. 557, 583-84 (2006) (“There is nothing absurd about a scheme under which pending habeas actions—particularly those, like this one, that challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed—are preserved . . .”).

<sup>212</sup> *Id.* Petitioner Hamdan later filed an *amicus curiae* brief in the *Boumediene* case.

<sup>213</sup> *Id.* at 568.

<sup>214</sup> *Id.* at 569.

<sup>215</sup> *Id.* at 567.

<sup>216</sup> *Id.* at 567, 594-95, 624-25, 635.

<sup>217</sup> 28 U.S.C. § 2241(e)(1) (Supp. 2007) (No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus . . .”).

<sup>218</sup> Pub. L. No. 109-366, 120 Stat. 2631, § 7(b) (2006).

<sup>219</sup> 553 U.S. at 738.

<sup>220</sup> *See id.* at 771.

<sup>221</sup> *Id.* at 732.

mid-1990s world of “migrants” “temporarily provided safe haven.”<sup>222</sup> That distinction made the difference.

The *Boumediene* petitioners were foreign citizens allegedly fighting against the United States and captured in Afghanistan, Bosnia, Gambia, and elsewhere.<sup>223</sup> The lead petitioner, Lakhdar Boumediene, was an Algerian national who had immigrated to Bosnia.<sup>224</sup> In October 2001, Bosnian police arrested Boumediene and five other Algerians for plotting to attack the U.S. embassy in Sarajevo.<sup>225</sup> The Bosnian court released them all for lack of evidence.<sup>226</sup> The police then re-arrested these individuals and handed them over to the U.S. military, which transferred them to Guantánamo.<sup>227</sup>

Like hundreds of others, these foreign citizens were detained in Guantánamo military prisons. While the prisoners could not initiate legal challenges to their detention in U.S. courts, they were subject to annual reviews by a military panel.<sup>228</sup> The Supreme Court had recognized in *Hamdi* that “the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”<sup>229</sup> In the wake of that decision, the Department of Defense established Combatant Status Review Tribunals (“CSRTs”) to determine whether Guantánamo detainees were in fact enemy combatants.<sup>230</sup> A CSRT determined that the petitioners in *Boumediene* were all enemy combatants,<sup>231</sup> and thus all sought a writ of habeas corpus in federal court.

The Court of Appeals for the D.C. Circuit ordered dismissal on the basis that “[f]ederal courts have no jurisdiction in these cases.”<sup>232</sup> The Military Commissions Act of 2006 had stripped the courts of jurisdiction to hear habeas applications by any alien “detained as an enemy combatant,” and the Detainee Treatment Act of 2005 provided alternative procedures for review of a detainee’s status.<sup>233</sup> Analyzing the legal nature of Guantánamo Bay, the court cited, *inter alia*, *CABA* for the proposition that “Cuba—not the United States—has sovereignty over Guantanamo Bay.”<sup>234</sup> Analyzing the history of how the Suspension Clause protected the habeas writ “as it existed in 1789,” the court then took a clear view against the detainees by finding precedent “that the Constitution does not confer rights on aliens without property or

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<sup>222</sup> See *CABA*, 43 F.3d at 1417.

<sup>223</sup> See *Boumediene*, 553 U.S. at 734.

<sup>224</sup> *Lakhdar Boumediene*, N.Y. TIMES, May 27, 2009, available at [http://topics.nytimes.com/top/reference/timestopics/people/b/lakhdar\\_boumediene/index.html?scp=1-spot&sq=lakhdar%20boumediene&st=cse](http://topics.nytimes.com/top/reference/timestopics/people/b/lakhdar_boumediene/index.html?scp=1-spot&sq=lakhdar%20boumediene&st=cse).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> See *Boumediene*, 553 U.S. at 734.

<sup>229</sup> 542 U.S. at 518 (quoting *Ex parte Quirin*, 317 U.S. 1 (1942)).

<sup>230</sup> See 553 U.S. at 723.

<sup>231</sup> *Id.*

<sup>232</sup> *Boumediene v. Bush*, 476 F.3d 981, 994 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 992.

presence within the United States.”<sup>235</sup> The detainees appealed, claiming that the Military Commissions Act violated the Suspension Clause and effected an unconstitutional withdrawal of their right to habeas corpus.

The Supreme Court on appeal considered two potential bars to the Guantánamo detainees’ invocation of the Suspension Clause: (1) “their status, *i.e.*, petitioners’ designation by the Executive Branch as enemy combatants”; and (2) “their physical location, *i.e.*, their presence at Guantánamo Bay.”<sup>236</sup> Note the order: first status, then location. The Court’s primary concern was *who* the detainees were rather than *where* they were.

Indeed, the Supreme Court gave less attention to location than prior heated discussions might have forecasted. Now the extraterritoriality of Guantánamo was simply accepted as given; the Court did “not question the Government’s position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantánamo Bay. But this does not end the analysis.”<sup>237</sup> Rather, the Court viewed sovereignty as a “multifaceted concept,”<sup>238</sup> and it distinguished between *de jure* sovereignty—which Cuba kept under the 1903 Lease Agreement—and *de facto* sovereignty—which the United States held “by virtue of its complete jurisdiction and control over the base.”<sup>239</sup> The United States’ “complete jurisdiction and control” over Guantánamo, rather than “legal and technical” sovereignty, proved sufficient to support constitutional guarantees even for non-U.S. citizens detained on non-U.S. soil.<sup>240</sup>

Adopting a “functional approach” as to the reach of the Constitution, and relying on “practical considerations” from earlier decisions in *Johnson v. Eisentrager*<sup>241</sup> and the Insular Cases,<sup>242</sup> the Supreme Court refused to allow the executive branch to “switch the Constitution on and off” by invoking another country’s *de jure* sovereignty over territory the United States governs.<sup>243</sup> With respect to enemy combatants detained in Guantánamo in particular, the Court examined “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s enti-

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<sup>235</sup> *Id.* at 988, 991.

<sup>236</sup> 553 U.S. at 739.

<sup>237</sup> *Id.* at 754.

<sup>238</sup> *Id.* at 763.

<sup>239</sup> *Id.* at 755.

<sup>240</sup> The Court drove home the point, calling the United States’ control over the Guantánamo naval station “absolute” and “indefinite.” *Id.* at 768.

<sup>241</sup> 339 U.S. 763 (1950); see discussion *infra* Section IV.A.

<sup>242</sup> In several opinions from the early 1900s, collectively known as the Insular Cases because they concerned islands administered by the Bureau of Insular Affairs, the Supreme Court found that the Constitution has force and application in U.S. territories that are not States—“a force not contingent upon acts of legislative grace.” 553 U.S. at 757; see *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904).

<sup>243</sup> *Boumediene*, 553 U.S. at 762-65.



tlement to the writ.”<sup>244</sup> All three considerations counseled in favor of extending habeas protections. First, the detainees disputed their status as enemy combatants, but lacked any meaningful advocate or review process under the CSRT determination.<sup>245</sup> Second, while the sites of apprehension and detention were all “technically” outside U.S. sovereignty, the detention site was within *de facto* U.S. sovereignty.<sup>246</sup> Lastly, the costs or threats to U.S. courts of hearing habeas claims were minimal; issuing the writ would not be “impracticable or anomalous.”<sup>247</sup>

Accordingly, the Supreme Court held that enemy combatants could invoke the protections of the Suspension Clause and seek the writ of habeas corpus and that neither their status as detained enemy combatants nor their location in Guantánamo was a barrier to application of this constitutional provision.<sup>248</sup> Given that the Military Commissions Act of 2006 did “not purport to be a formal suspension of the writ,” Guantánamo prisoners retained “the privilege of habeas corpus to challenge the legality of their detention.”<sup>249</sup> Congress could not avoid the requirements of the Suspension Clause by looking to the Detainee Treatment Act of 2005, which the Court found a poor replacement for habeas procedures.<sup>250</sup>

In so holding, the Court extended its post-9/11 detainee jurisprudence to the furthest protection yet, granting constitutional habeas corpus rights to foreign citizens captured in foreign lands and detained in Guantánamo as enemy combatants. Lead petitioner Lakhdar Boumediene was released from U.S. custody on May 15, 2009, and now lives in France.<sup>251</sup>

### B. Boumediene’s *Limited Reach*

The Supreme Court took pains—repeatedly—to stress that its holding in *Boumediene* did not extend beyond that specific case. The Court iterated that its “decision today holds only that *petitioners before us* are entitled to seek the writ . . . and that *petitioners in these cases* need not exhaust the review procedures in the Court of Appeals before proceeding with their

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<sup>244</sup> *Id.* at 766.

<sup>245</sup> *Id.* at 767.

<sup>246</sup> *Id.* at 768.

<sup>247</sup> *Id.* at 769-70 (quoting *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring in result)); see Marc D. Falkoff & Robert Knowles, *Bagram, Boumediene, and Limited Government*, 59 DEPAUL L. REV. 851, 871 (2010) (arguing that *Boumediene* marked the “triumph” of the “impracticable and anomalous” test from *Reid*).

<sup>248</sup> 553 U.S. at 771 (“We hold that Art. 1, § 9, cl. 2, of the Constitution has full effect at Guantánamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.”).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 792. While finding the Detainee Treatment Act procedures wanting when weighed against habeas corpus, the Court stressed that “[t]he only law we identify as unconstitutional is MCA § 7 . . . . Accordingly, both the DTA and the CSRT process remain intact.” *Id.* at 795.

<sup>251</sup> See News Release, U.S. Department of Justice, Office of Public Affairs, United States Transfers Lakhdar Boumediene to France (May 15, 2009), available at <http://www.justice.gov/opa/pr/2009/May/09-ag-477.html>.

habeas actions in the District Court.”<sup>252</sup> Underscoring the unique historical moment in which the Court decided *Boumediene*, the concluding paragraphs of the majority opinion are a sad recognition of the law’s role in these “extraordinary times.”<sup>253</sup> While the majority pondered the effects of its ruling, it ignored any fallout from its extraordinary finding of *de facto* U.S. sovereignty over Guantánamo.<sup>254</sup> The Court’s concern was that the executive branch still protect us from “those who pose a real danger to our security.”<sup>255</sup> This final concern echoed throughout the opinion, as the Court considered the litigants’ status—“a prisoner deemed an enemy combatant”<sup>256</sup>—before their location—“a territory, like Guantánamo, over which the Government has total military and civil control.”<sup>257</sup>

In dissent, Justice Scalia ridiculed the majority opinion as a “crazy result” for its inconsistent approach to what should be a clear analysis.<sup>258</sup> In his view, the Constitution does not reach territories over which the United States lacks sovereignty.<sup>259</sup> The surface appeal of this view is obvious, as consistency has value. Justice Scalia would have the Supreme Court maintain this clear analysis for any foreign national in U.S. hands in Guantánamo, whether a refugee or a terrorist.

The result in *Boumediene* seems crazy for another reason: it contrasts so vividly with the Eleventh Circuit’s holding in *CABA v. Christopher*.<sup>260</sup> This time around, after 9/11 and more than a decade after the Cuban rafter crisis, the Supreme Court granted certiorari on a case involving Guantánamo detainees claiming constitutional rights and found that the Constitution did protect those detainees. The Court in *Boumediene* did not cite *CABA* at all,

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<sup>252</sup> 553 U.S. at 795 (emphases added).

<sup>253</sup> *Id.* at 797.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 746-47.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 841 (Scalia, J., dissenting).

<sup>259</sup> *See id.* at 834-41 (Scalia, J., dissenting).

<sup>260</sup> Cf. Ernesto Hernández-López, *Guantánamo as a “Legal Black Hole”: A Base for Expanding Space, Markets, and Culture*, 45 U.S.F. L. REV. 141, 169 (2010) (“The Court fashioned a functional test to determine which constitutional provisions apply to this overseas location under American control.”); James Park, *Effectuating Principles of Justice in Ending Indefinite Detention: Historical Repetition and the Case of the Uyghurs*, 31 WHITTIER L. REV. 785, 806 (2010) (“Guantánamo Bay was argued to be the sovereign territory of the nation of Cuba as a convenient fiction despite the years of isolation between the two nations. This argument was shattered when the United States Supreme Court held that habeas corpus for ‘War on Terror’ detainees was due in *Boumediene v. Bush*, decided in 2008.”); Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 259 (2009) (“major question” arising from *Boumediene*’s functional approach is “whether and when foreign nationals who are not in U.S. custody (unlike the *Boumediene* petitioners) are also potentially eligible for constitutional protection”); *see also id.* at 272 (“Conceivably, the *Boumediene* majority considered it unnecessary to fully specify the baseline because the case provided an adequate context-specific baseline, such as ‘individuals in U.S. custody.’”); Sonia R. Farber, Comment, *Forgotten at Guantánamo: The Boumediene Decision and Its Implications for Refugees at the Base Under the Obama Administration*, 98 CAL. L. REV. 989, 1003 (2010) (*Boumediene* and *Rasul* “provide relief to refugees having as much, if not more, claim to the protections of the U.S. legal system as their neighboring detainees at Guantánamo”).

for anything, not even a simple nod to an earlier Court of Appeals result in a different direction.

If the Court had wanted to extend constitutional protections to individuals outside the enemy combatant category, it easily could have done so. The majority cited *Sale v. Haitian Centers Council, Inc.*,<sup>261</sup> concerning Haitian refugees held in Guantánamo prior to 9/11, and recognized that the government took the view even then that “Guantanamo is territory ‘outside the United States.’”<sup>262</sup> Moreover, post-9/11 detainee jurisprudence includes direct links to the *CABA* case. The D.C. Circuit Court in *Boumediene* cited *CABA*,<sup>263</sup> and both the D.C. Circuit and District Courts in *Rasul* discussed and relied on *CABA*.<sup>264</sup> In deciding *Boumediene*, then, the Supreme Court was undoubtedly aware of *CABA*’s holding.

The Court’s awareness of *CABA* was not the issue. Rather, the *Boumediene* petitioners’ status as detained enemy combatants was the issue. That status both reconciles the cases and shows that the judicial sphere yielded the appropriate outcome for the Guantánamo refugees.

#### IV. EVALUATING JUDICIAL OUTCOME

Court opinions crafted an important difference between the case of Cuban and Haitian refugees in the mid-1990s and the case of enemy combatants after the September 11th attacks. In *CABA v. Christopher*, the U.S. military housed “migrants” in Guantánamo “safe haven” camps, for only as long as they wished, as a “gratuitous humanitarian act.”<sup>265</sup> In *Boumediene v. Bush*, the U.S. military “detained” “enemy combatants” in Guantánamo prisons, after apprehension “on the battlefield” abroad for killing and attempting to kill Americans.<sup>266</sup> The *CABA* and *Boumediene* cases suggest that the Constitution reaches enemy combatants but not migrants. The Eleventh Circuit concluded that there was no “legal answer” to the migrants’ plight.<sup>267</sup> And the Supreme Court’s decision, limited on its terms to the “petitioners before us,” does not obviously apply to migrants or refugees.<sup>268</sup>

This result seems illogical because it appears counterintuitive for the courts to confer constitutional protections on captured foreign citizens who kill or attempt to kill Americans abroad—indeed attempt to destroy the United States altogether—but not on refugees who display no such hostility and instead desire to become part of this nation. The results from *CABA* and

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<sup>261</sup> 509 U.S. 918 (1993).

<sup>262</sup> 553 U.S. at 753 (citing Brief for Petitioners in *Sale v. Haitian Centers Council, Inc.*) (emphasis in original).

<sup>263</sup> 476 F.3d at 992.

<sup>264</sup> 321 F.3d at 1143; 215 F. Supp. 2d at 72.

<sup>265</sup> 43 F.3d at 1417, 1427.

<sup>266</sup> 553 U.S. at 734.

<sup>267</sup> 43 F.3d at 1430.

<sup>268</sup> 553 U.S. at 795.

*Boumediene*, however, are consistent after all. Upon a deeper examination, the results reflect the principles of our domestic criminal system.

#### A. *Reconciling CABA and Boumediene*

The *Boumediene* opinion contains, significantly, two analyses—both necessary, neither alone sufficient. The Supreme Court’s primary analysis focused on the nature of the petitioners, *i.e.*, detained enemy combatants; the Court’s secondary analysis focused on the nature of the location, *i.e.*, *de facto* U.S. sovereign territory.<sup>269</sup> Under the secondary analysis, the Court’s “functional approach” to the Constitution’s application in *Boumediene* is inconsistent with the Eleventh Circuit’s approach in *CABA* that Guantánamo Bay was not “functionally equivalent” to land within U.S. borders.<sup>270</sup> It is also inconsistent with the Court’s prior decision to deny certiorari in *CABA*. Indeed, looking only at location—Guantánamo as the site of extraterritorial constitutional reach—it is reasonable to think that the Supreme Court’s opinion provides a new avenue of judicial relief for refugees and undercuts the result in *CABA*. But the primary analysis shows that, even accepting the United States’ *de facto* sovereignty over Guantánamo, it does matter who the petitioners are when determining the extent of constitutional reach.<sup>271</sup> Contrary to migrants in Guantánamo, the terrorists faced indefinite detention for the rest of their lives.

The extreme circumstances of the Guantánamo cases underscore a familiar element in our domestic criminal justice system. Legal protections attach to an individual’s status, even at the expense of creating perverse incentives. A status based on alleged misconduct—for example, as a pre-trial detainee charged with a felony—triggers certain rights and protections that do not attach to a more innocuous status based on hopes and aspirations. Analogously, threatening the United States triggers certain constitutional protections, while seeking freedom there does not.

The Sixth Amendment stands as a ready example of constitutional rights attaching to criminal status, particularly as it concerns just what the Guantánamo refugees were requesting in their thousands of notes and letters: legal representation. The Sixth Amendment confers the right to counsel on an indigent defendant, but not just any indigent defendant.<sup>272</sup> The right is predicated on the risk of a loss of liberty. The Amendment provides, in relevant part, that “[i]n all criminal prosecutions, the accused shall . . . have

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<sup>269</sup> *Id.* at 739.

<sup>270</sup> 43 F.3d at 1425.

<sup>271</sup> See 553 U.S. at 732, 795.

<sup>272</sup> See *United States v. Dixon*, 509 U.S. 688, 696 (1993). Similarly, *Miranda* rights under the Fifth Amendment attach only upon custodial interrogation in criminal proceedings. See, e.g., *Stansbury v. California*, 511 U.S. 318, 322 (1994) (*Miranda* measures are required “only where there has been such a restriction on a person’s freedom as to render him ‘in custody’”) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam)); accord *Verdugo-Urquidez*, 494 U.S. at 264 (noting that Fifth Amendment privilege against self-incrimination is a fundamental trial right of criminal defendants).

the Assistance of counsel for his defence.”<sup>273</sup> By its terms, this constitutional right to counsel exists for “criminal prosecutions” and attaches upon commencement of judicial proceedings against the defendant, by “formal charge, preliminary hearing, indictment, information, or arraignment.”<sup>274</sup> The right, then, depends on criminal charges carrying a penalty of incarceration, and it protects a defendant at “critical stages” of the proceedings.<sup>275</sup>

In contrast to a criminal defendant facing incarceration, a civil litigant cannot claim these constitutional protections, as “the Sixth Amendment does not govern civil cases.”<sup>276</sup> In its few decisions concerning the right to counsel in civil matters, the Supreme Court has held that the Fourteenth Amendment’s Due Process Clause requires the government to provide counsel in certain cases where a civil litigant faces consequences akin to criminal consequences—specifically the loss of liberty.<sup>277</sup> Thus, the State must pay for counsel representation in a civil juvenile delinquency action that could result in incarceration.<sup>278</sup> But even so, the “Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened.”<sup>279</sup> Rather, the Supreme Court has adopted a flexible test for counsel provision for civil litigants, outside the strict application of Sixth Amendment protections to criminal defendants.<sup>280</sup> For example, the State need not pay for counsel representation in a civil contempt proceeding for an indigent litigant subject to a child support order who faces incarceration, where the opposing litigant lacks representation and the State provides alternative procedural safeguards.<sup>281</sup>

In brief, neither criminal defendants facing penalties other than loss of liberty nor civil litigants enjoy the constitutional guarantee of counsel. A different status yields a different set of rights. Examining the opinions in *CABA* and *Boumediene*, and accepting those opinions’ depictions of the facts, a similar distinction can be drawn across the types of petitioners asserting constitutional claims in each case. The petitioners in *Boumediene*, who were designated by the executive branch as enemy combatants and who faced indefinite detention in Guantánamo military prisons—analogueous to criminal defendants facing incarceration—were granted constitutional protections. The plaintiffs in *CABA*, who were designated by the executive and judicial branches as migrants for their attempts to escape oppressive homeland regimes and who received safe haven in Guantánamo camps for as long

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<sup>273</sup> U.S. CONST. amend. VI.

<sup>274</sup> *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

<sup>275</sup> *See, e.g., Iowa v. Tovar*, 541 U.S. 77, 87 (2004) (“The Sixth Amendment secures to a defendant facing incarceration the right to counsel at all ‘critical stages’ of the criminal process, including a plea hearing.”) (internal citations omitted).

<sup>276</sup> *Turner v. Rogers*, 131 S. Ct. 2507, 2516 (2011).

<sup>277</sup> *See id.* (describing “handful of cases”).

<sup>278</sup> *See In re Gault*, 387 U.S. 1, 35-42 (1967).

<sup>279</sup> *Turner*, 131 S. Ct. at 2518.

<sup>280</sup> *See id.* at 2519-20.

<sup>281</sup> *See id.* at 2520 (holding that “the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration”) (emphasis in original).

as they chose to stay—analogous to civil litigants—were denied constitutional protections.<sup>282</sup>

The judicial distinction between migrants in safe haven and enemy combatants in military prison may exacerbate the perversity of incentives for misconduct. However, it neatly overlaps with distinctions drawn every day in criminal courthouses and dampens any thought that future refugees in *de facto* U.S. sovereign land might invoke *Boumediene* to claim constitutional rights. Interestingly, the rumors spreading among Cuban refugees in Guantánamo foreshadowed this judicial view. The refugees expressed concern that, while they languished “locked up” in camps, others who committed felony crimes were transferred to the United States to be prosecuted under U.S. laws.<sup>283</sup> Whether the rumor was true or false, the logic is the same: misdeeds trigger rights and open courthouse doors.<sup>284</sup>

It is important to recognize that the issue of distinguishing between types of petitioners and applying constitutional protections to one type (criminal, indefinite detainee, enemy combatant) rather than the other (non-criminal, temporary resident, migrant) is different than the issue of determining whether constitutional protections apply extraterritorially. Critically, *Boumediene* offers a two-part analysis—status *and* location—and any reliance on the opinion that focuses exclusively on one part is incomplete.

Prior to *Boumediene*, the Supreme Court had held in *United States v. Verdugo-Urquidez*<sup>285</sup> and *Johnson v. Eisentrager*<sup>286</sup> that the criminal protections of the Fourth and Fifth Amendments do not apply extraterritorially.<sup>287</sup> In *Verdugo-Urquidez*, the petitioner was a Mexican citizen accused of running a violent organization smuggling narcotics into the United States.<sup>288</sup> He was apprehended by Mexican police officers and transported to California, where he remained in pre-trial detention at the time of the Court’s decision.<sup>289</sup> After petitioner’s arrest, agents from the U.S. Drug Enforcement Agency raided his Mexican residence and seized documents related to drug smuggling.<sup>290</sup> The Supreme Court found no Fourth Amendment grounds under which the detainee could challenge the agents’ search because “[a]t

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<sup>282</sup> In his concurrence in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2551 (2009), Justice Thomas links *Boumediene* and the Sixth Amendment in an analysis of the Framers’ understanding of the Confrontation Clause.

<sup>283</sup> Counsel Request from Hector Medina Diaz, Guantánamo refugee No. 000 833 057, to Osvaldo Soto, attorney (1994) (on file with author); see Orlando J. Cabrera, Attorney, Memorandum re: Diary of Events at the United States Naval Base at Guantánamo Bay, Cuba November 7 to November 10, 1994 (Nov. 13, 1994) (on file with author).

<sup>284</sup> The rumor may have been exaggerated to include the transfer element, as certain U.S. criminal statutes apply to prosecutions of foreign nationals at the Guantánamo naval base. See, e.g., *United States v. Lee*, 906 F.2d 117, 117 (4th Cir. 1990) (appeal of dismissal of 18 U.S.C. §§ 2241 and 2244 indictment of Jamaican national charged with sexual abuse of a minor at Guantánamo naval base).

<sup>285</sup> 494 U.S. 259 (1990).

<sup>286</sup> 339 U.S. 763 (1950).

<sup>287</sup> See 494 U.S. at 274-75; 339 U.S. at 784-85.

<sup>288</sup> 494 U.S. at 262.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application."<sup>291</sup>

Forty years earlier, in *Eisentrager*, petitioners were twenty-one German nationals who had continued to fight allied troops in Japan after Germany's surrender in World War II.<sup>292</sup> They were arrested and convicted in China for violating the laws of war<sup>293</sup> and then repatriated to Germany to serve their sentences, all under the auspices and command of the U.S. military.<sup>294</sup> The Supreme Court denied these prisoners any Fifth Amendment right to challenge their trial, conviction, or imprisonment, holding that "the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States."<sup>295</sup>

*Boumediene* may be read consistently with these prior holdings. Controlling for type of detainee, the analyses turn on the reach of the Constitution to the type of location. While the United States claimed *de facto* sovereignty over the location at issue in *Boumediene*—Guantánamo Bay—it did not claim any sort of sovereignty over the location at issue in *Verdugo-Urquidez*—Mexico—nor the locations at issue in *Eisentrager*—China and Germany.<sup>296</sup> Similarly, *Boumediene* may be read consistently with *CABA* because, controlling for the type of location, the analyses turn on the reach of the Constitution to the type of petitioner. While the courts recognized habeas corpus rights for enemy combatants in detention who tried to kill

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<sup>291</sup> *Id.* at 274-75. Two years after deciding *Verdugo-Urquidez*, the Supreme Court decided *United States v. Alvarez-Machain* and further narrowed the constitutional protections for foreign citizens accused of crimes outside the United States. 504 U.S. 655 (1992). There, the Court held that a federal court had jurisdiction over a Mexican citizen who had been kidnapped and transferred from Mexico to the United States to face charges of killing a U.S. federal agent. *Id.* at 659; *see id.* at 670 ("The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States.").

<sup>292</sup> 339 U.S. at 765-66. Justice Jackson, who authored the *Eisentrager* opinion, served as Representative and Chief Counsel in the Nuremberg war crime trials from 1945 to 1946. From 1948 to 1950, when the Supreme Court decided *Eisentrager*, "over 200 German enemy aliens confined by American military authorities abroad" filed habeas petitions in the Court. *Id.* at 768 n.1. Justice Jackson recused himself from those cases. *See Al Odah*, 321 F.3d at 1138. The German petitioners in *Eisentrager*, by contrast, were not convicted at Nuremberg. *See id.*

<sup>293</sup> 339 U.S. at 766.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 785; *see id.* at 771 ("[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."). The Court found it compelling that applying Fifth Amendment rights to alien enemies would confer on them greater protections than apply to American soldiers: "American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans." *Id.* at 783.

<sup>296</sup> *See Verdugo-Urquidez*, 494 U.S. at 274-75; *Eisentrager*, 339 U.S. at 784.

Americans, the courts did not recognize due process rights for migrants in safe haven who tried to join the United States.

Thus, *CABA* stands as a final statement from the Eleventh Circuit—solidified by both the Supreme Court’s denial of certiorari in *CABA* and its opinion in *Boumediene*—that Guantánamo refugees have no due process rights under the Constitution. More specifically, the law stands as a denial of constitutional rights to Guantánamo migrants rather than enemy combatants. Guantánamo was, as *CABA* petitioners argued to the Supreme Court, a constitutional rights-free zone<sup>297</sup>—for anyone seeking freedom in the United States and accepting the gratuitous humanitarian provision of safe harbor.

### B. Potential Test Cases

In order to be a gratuitous humanitarian act and escape the reach of the Constitution,<sup>298</sup> the housing of refugees on non-criminal grounds cannot be indefinite or involuntary. The only way to preserve the distinctions articulated above is to ensure that the provision of safe haven does not, by virtue of duration or force, morph into indefinite detention. In *CABA*, the Eleventh Circuit acknowledged and readily endorsed the government’s pledge not to hold the “migrants for an indefinite period of time or against their will” in Guantánamo camps.<sup>299</sup> In future cases, the line between safe haven and forced detention may be less clear.

How long is too long for military housing to lose its cozy description as safe haven and its exemption from due process? When does an impossible choice between options create a condition of detention and trigger rights? A flexible test emerges from *Boumediene*, reminiscent of the flexible test applied in Sixth Amendment civil cases.<sup>300</sup> Following *Boumediene*, a court must consider whether application of constitutional protections would be “impracticable or anomalous.”<sup>301</sup> Two related, recent opinions from the Court of Appeals for the D.C. Circuit, both styled *Kiyemba v. Obama*,<sup>302</sup> provided a potential test case but concluded without clear guidance on these questions.

In the *Kiyemba* cases, seventeen Chinese Uighurs captured in Afghanistan soon after September 11, 2001, were held as enemy combatants in Guantánamo camps.<sup>303</sup> The Uighurs are a Turkic Muslim minority in the Xinjiang province of China, and these detainees were initially determined to be enemy combatants based on their training in camps associated with al

<sup>297</sup> Petition for Writ of Certiorari at 24, *CABA v. Christopher*, 516 U.S. 913 (1995); see Frank J. Murray, *Court Rejects Appeal for Cuban Refugees ‘Boat People’ Lose Legal Fight for Rights*, WASH. TIMES, Oct. 11, 1995, at A4.

<sup>298</sup> *CABA*, 43 F.3d at 1427.

<sup>299</sup> *Id.* at 1418; see Memorandum from Jorge L. Hernandez-Torano to Comm. for Freedom of Guantánamo Detainees (Oct. 18, 1994) (on file with author).

<sup>300</sup> See, e.g., *Turner*, 131 S. Ct. at 2519-20.

<sup>301</sup> 553 U.S. at 770.

<sup>302</sup> 555 F.3d 1022 (D.C. Cir. 2009); 605 F.3d 1046 (D.C. Cir. 2010).

<sup>303</sup> See 555 F.3d at 1023-24.



Qaeda and the Taliban.<sup>304</sup> Later, the detainees were determined not to be enemy combatants.<sup>305</sup>

The Uighurs in Guantánamo petitioned for habeas relief to be released into the United States and were granted such release by the D.C. District Court. The government appealed, and the D.C. Circuit Court reversed, holding that federal courts lacked the authority to review the executive branch's decision to exclude these foreign nationals from the United States.<sup>306</sup> The Supreme Court granted certiorari.<sup>307</sup> "New developments," however, derailed the high court's potential statement on the Uighurs' confinement.<sup>308</sup> By the time the Supreme Court decided the case, all seventeen had received an offer from a third country to resettle.<sup>309</sup> Twelve accepted, while five rejected the offers and chose to remain in Guantánamo.<sup>310</sup> The Uighurs' stay in Guantánamo, therefore, was neither indefinite nor involuntary when their case reached the Supreme Court. Consequently, the Court vacated and remanded,<sup>311</sup> and the D.C. Circuit Court reaffirmed its prior position that "petitioners never had a constitutional right to be brought to this country and released."<sup>312</sup>

Another potential test case is developing in the nascent prosecution of Ahmed Abdulkadir Warsame.<sup>313</sup> Warsame is a Somali national who was captured by the U.S. military in international waters and accused of supporting al Qaeda. Rather than transferring Warsame to Guantánamo, military officials held him on a U.S. naval vessel in international waters. In July 2011, after two months of detention and secret interrogations, Warsame entered the civilian judicial system and now faces trial in federal court in New York.

<sup>304</sup> See *id.* at 1024.

<sup>305</sup> See *id.*

<sup>306</sup> See *id.* at 1026; see also 605 F.3d at 1048.

<sup>307</sup> *Kiyemba v. Obama*, 130 S. Ct. 458 (2009).

<sup>308</sup> *Kiyemba v. Obama*, 130 S. Ct. 1235, 1235 (2010) (per curiam).

<sup>309</sup> *Id.*; see Erik Eckholm, *Out of Guantánamo, Uighurs Bask in Bermuda*, N.Y. TIMES, June 15, 2009, at A4; David Johnston, *Uighurs Leave Guantánamo for Palau*, N.Y. TIMES, Oct. 31, 2009, at A22.

<sup>310</sup> 605 F.3d at 430; see Hernández-López, *supra* note 260, at 171 ("The most dramatic example of how legal anomaly at Guantánamo develops and expands concerns the five remaining Uighurs at the base."); Park, *supra* note 260, at 801 ("Based on these landmark Supreme Court decisions, the Uyghurs were finally given an opportunity for judicial redress to combat their indefinite detention."); Farber, *supra* note 260, at 1017-20 (discussing case of Uighurs).

<sup>311</sup> 130 S. Ct. at 1235.

<sup>312</sup> 605 F.3d at 1048 (reinstating original opinion, as modified "to take account of new developments"). In his analysis of the interplay between the Due Process and Suspension Clauses, Geltzer argues that the *Kiyemba* decisions affirm the D.C. Circuit's pre-*Boumediene* view that Guantánamo detainees lack due process protections. See Geltzer, *supra* note 188, at 25 ("While the D.C. Circuit has thus held that, even after *Boumediene*, the Due Process Clause does not extend to aliens at Guantánamo, it is worth noting a passage from the D.C. Circuit's 2007 opinion in *Boumediene* that might provide grounds for reconsideration of this position should the issue ever be reassessed en banc.").

<sup>313</sup> See Editorial, *Terrorism and the Law: The Case of a Somali Accused of Terrorism is Ending Right, but Started Wrong*, N.Y. TIMES, July 17, 2011, at SR11.

The court presiding over Warsame's trial may have occasion to determine whether, for purposes of constitutional reach, a U.S. naval vessel on the high seas is on par with the Guantánamo naval base and, thus, the functional equivalent of U.S. territory.<sup>314</sup> These sites are already comparable in certain legal contexts.<sup>315</sup> If the court finds parity, then *Boumediene* supports the application of constitutional habeas protections to enemy combatants detained on such vessels and counsels against secret interrogations. This determination will become pressing in the event the Guantánamo detention centers ever close. On several key issues, then, the judicial line remains blurred.

## V. EVALUATING POLITICAL OUTCOME

In contrast to the judicial outcome of the Cuban rafter crisis in Guantánamo, there remains the truth of what happened on the ground. The political sphere yielded a different, though also appropriate, outcome. The Cuban refugees came to the United States. While the denial of constitutional rights was appropriate based on judicial distinctions between migrants and enemy combatants, the refugees' entry into the United States was appropriate based on what was happening far away from the litigation.

At the start of the Cuban rafter crisis, Attorney General Reno stated that the rafters would be "detained in appropriate facilities."<sup>316</sup> In the trial court, Judge Atkins ruled on issues concerning the "detained plaintiff refugees."<sup>317</sup> In its initial rulings, the Eleventh Circuit granted attorneys access to the "detainees."<sup>318</sup> The Guantánamo refugees certainly felt detained, even "locked up" on the naval base,<sup>319</sup> facing the impossible choice between staying in overcrowded, tense camps or repatriating to the same oppressive regime they had recently fled. The refugees' escape attempts, unrest, and confinement suggest that their living conditions were less akin to safe haven residency and more akin to involuntary and seemingly indefinite detention.

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<sup>314</sup> Cf. *Boumediene*, 553 U.S. at 764 (taking "functional approach to questions of extraterritoriality").

<sup>315</sup> See U.S. CONST. art. III, § 2 (federal judicial power extends "to all Cases of admiralty and maritime Jurisdiction"); 18 U.S.C. § 7(1), (3) ("special maritime and territorial jurisdiction of the United States" includes both "[t]he high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof" and "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof"); cf. *United States v. Flores*, 289 U.S. 137, 155-56 (1933) (noting that a merchant vessel "is deemed to be a part of the territory" of the sovereignty whose flag it flies).

<sup>316</sup> Janet Reno, U.S. Attorney General, Press Briefing (Aug. 19, 1994).

<sup>317</sup> Order Granting Plaintiffs' Emergency Motion for Temporary Restraining Order at 4, 13, *CABA v. Christopher*, No. 94-CV-2183 (S.D. Fla. Oct. 31, 1994) (No. 44).

<sup>318</sup> Order by the Court at 2, *CABA v. Christopher*, 43 F.3d 1412 (11th Cir. 1995).

<sup>319</sup> Counsel Request from Hector Medina Diaz, Guantánamo refugee No 000 833 057, to Osvaldo Soto, attorney (1994) (on file with author).

These conditions warranted release into the United States.<sup>320</sup> In closing the door on the Cuban and Haitian refugees, the Eleventh Circuit warned that they had no “legal answer” and would have to find non-judicial remedies to their plight.<sup>321</sup> The refugees did just that.

In the aftermath of the rapid-fire *CABA* litigation in the Southern District of Florida and the Eleventh Circuit, and while the refugees briefed their certiorari petition to the Supreme Court, those involved in the case looked outside the court system for help. On January 31, 1995, the Dade County Bar Association prepared a report to the American Bar Association House of Delegates seeking a resolution “to protect the rights of Cuban and Haitian refugees.”<sup>322</sup>

Within a few months, the Cuban refugees found a solution. They were allowed to enter the United States under a May 2, 1995, humanitarian parole announced by the Clinton administration.<sup>323</sup> Most of the Haitian refugees had repatriated to Haiti after Aristide returned to power in October 1994, with the last group leaving Guantánamo in November 1995.<sup>324</sup> Under the May 2nd plan, the Administration allowed nearly all of the 20,000 Cubans remaining in Guantánamo to enter the United States, on a case-by-case basis, as “special Guantánamo entrants.”<sup>325</sup> The White House continued to use the term “migrants” rather than “refugees,” but finally opened U.S. doors.<sup>326</sup>

Cuban refugees were paroled into the United States at a rate of 500 to 550 per week, on three weekly flights from Guantánamo to Homestead Air

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<sup>320</sup> Ethnographic data from the Guantánamo camps support the view that “safe haven” was a misnomer and that the camps were detention centers. See Elizabeth Campisi, *Guantánamo: Safe Haven or Traumatic Interlude?*, 3 *LATINO STUDIES* 375, 380 (Nov. 2005) (“While people working in the larger political structures were figuring out what to do with them, the balseros were experiencing trauma and stress distress in Guantánamo and elsewhere.”).

<sup>321</sup> *CABA*, 43 F.3d at 1430.

<sup>322</sup> The American Bar Association adopted the resolution. See Am. Bar Ass’n, International Law Section Policy (Feb. 1995), available at [http://www.americanbar.org/groups/international\\_law/policy/human\\_rights.html](http://www.americanbar.org/groups/international_law/policy/human_rights.html).

<sup>323</sup> Janet Reno, U.S. Attorney General, Press Briefing (May 2, 1995); see also Mike Clary, ‘Parole’ Lets 6,000 Cuban Refugees Settle in the U.S., *L.A. TIMES*, Mar. 18, 1995, at 14.

<sup>324</sup> See Mireya Navarro, *Last of Refugees From Cuba In ‘94 Flight Now Enter U.S.*, *N.Y. TIMES*, Feb. 1, 1996, at 8; Janet Reno, U.S. Attorney General, Press Briefing (May 2, 1995) (“[a] little over 400” Haitians in Guantánamo as of May 2, 1995).

<sup>325</sup> Janet Reno, U.S. Attorney General, Press Briefing (May 2, 1995). As of June 1995, approximately 18,800 Cuban refugees remained in Guantánamo camps. See GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS, *supra* note 20, at 8; *Refugee Appeal Turned Down*, ASSOCIATED PRESS, Oct. 19, 1995; Frank J. Murray, *Court Rejects Appeal for Cuban Refugees; ‘Boat People’ Lose Legal Fight for Rights*, *WASH. TIMES*, Oct. 11, 1995, at A4 (U.S. had already admitted 10,000 Guantánamo refugees at time of Supreme Court’s denial of certiorari in *CABA*).

<sup>326</sup> According to former Coast Guard officer Randy Beardsworth, the U.S. government’s strategy at the end of the 1994 rafter crisis depended on the political and legal determination that Cuban nationals “rescued” or “picked up” at sea were migrants rather than refugees. See E-mail from Randy Beardsworth, Catalyst Partners, to author (July 17, 2011) (on file with author); telephone interview with Randy Beardsworth, Catalyst Partners (July 22, 2011).

Force Base just south of Miami.<sup>327</sup> On January 31, 1996, the last Cuban refugees arrived in Homestead, and the U.S. government closed the tent camps.<sup>328</sup> United States Immigration and Customs Enforcement (“ICE”) still runs a small migrant facility in Guantánamo, holding approximately 400 people.<sup>329</sup> ICE stands ready to “ramp up the camp” to handle up to 10,000 people in case of another mass migration.<sup>330</sup>

As a “companion accord” to its May 2nd humanitarian parole, the Clinton administration revised the Cuban Adjustment Act, adopting the “wet foot, dry foot” policy in effect today.<sup>331</sup> Cuban refugees intercepted at sea are returned to Cuba, while those reaching U.S. land can apply for permanent resident alien status in the United States.<sup>332</sup> Essentially, the “wet foot, dry foot” policy shifted the location where the Cuban Adjustment Act takes effect: now exclusively on land.<sup>333</sup>

The Clinton administration also expressed “satisfaction” that the Castro regime had “honored” its commitment not to inflict reprisals on refugees who were repatriated.<sup>334</sup> Yet, for all its supposed agreement with and assurances to the United States, Cuba adopted no structural reforms in response to

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<sup>327</sup> GAO REPORT, U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS, *supra* note 20, at 8. CABA plaintiff Lizbet Martínez, the twelve-year-old girl who played her violin in the Guantánamo camps, entered the United States with her family in January 1995. The Miami exile community gifted her with a Stradivarius violin. She is now an elementary school teacher in Hialeah, Florida. See John Lantigua, *Fiddler on the Move: Girl Rafter To Be Let In*, MIAMI HERALD, Jan. 13, 1995, at 1A; Peggy Landers, *Refugee Violinist Getting New Instrument*, MIAMI HERALD, Jan. 5, 1995 at 2B.

<sup>328</sup> See United States Navy Fact File, Naval Station Guantánamo Bay, Cuba (Nov. 8, 2011); Mireya Navarro, *Last of Refugees From Cuba In '94 Flight Now Enter U.S.*, N.Y. TIMES, Feb. 1, 1996, at 8. The *balseros* were finally welcome in America, but their post-Guantánamo lives were not without hardship. With 2000 Cuban refugees arriving each month in South Florida, many faced a lack of jobs and sponsors. See Mirta Ojito, *Many Rafterers Face Hard Times In New Land Problems Could Grow As Refugees Keep Coming*, MIAMI HERALD, Oct. 14, 1995, at 1A.

<sup>329</sup> See United States Navy Fact File, Naval Station Guantánamo Bay, Cuba (Nov. 8, 2011) (“The migrants are either interdicted at sea by the U.S. Coast Guard or asylum seekers who make it across the border by land or by water. . . . If officials find the interdictees or asylum seekers have legitimate grounds to be granted asylum, they are eventually moved to a third-party country, generally in Latin America.”).

<sup>330</sup> Telephone interview with Randy Beardsworth, Catalyst Partners (July 22, 2011); E-mail from Randy Beardsworth, Catalyst Partners, to author (Aug. 11, 2011) (on file with author).

<sup>331</sup> Fact Sheet: Cuba-U.S. Migration Accord, U.S. Department of State, Bureau of Western Hemisphere Affairs (Aug. 28, 2000) (“Under a May 1995 companion accord, the United States began returning Cubans interdicted at sea or entering the U.S. Naval Base at Guantánamo Bay who did not have a well-founded fear of persecution if returned.”).

<sup>332</sup> Janet Reno, U.S. Attorney General, Press Briefing (May 2, 1995).

<sup>333</sup> Telephone interview with Randy Beardsworth, Catalyst Partners (July 22, 2011).

<sup>334</sup> Janet Reno, U.S. Attorney General, Press Briefing (May 2, 1995); see Fact Sheet: Cuba-U.S. Migration Accord, U.S. Department of State, Bureau of Western Hemisphere Affairs (Aug. 28, 2000).

the *balseros* crisis.<sup>335</sup> According to Human Rights Watch, Cuba's violation of basic human rights continues unabated.<sup>336</sup>

A main motivation for the Clinton administration's May 2nd parole was the lack of safety and stability at the Guantánamo camps. Military commanders convinced the White House that holding 20,000 refugees indefinitely in camps would cause further riots.<sup>337</sup> The military had always seen its function in housing the Cuban rafters as humanitarian, which was in tension with the true meaning and purpose of Guantánamo Bay as a naval base. According to a former Coast Guard officer, "the military has always hated dealing with migrants in Guantánamo. Their perspective was that they didn't sign up for that; it was not their mission."<sup>338</sup> The military did not want to be "managing migrant camps," and so commanders were "always pushing to close the camps."<sup>339</sup> Housing tens of thousands of Cuban rafters in Guantánamo was simply not sustainable.

This motivation from the military echoed the motivation for *CABA* plaintiffs' requests in the Southern District of Florida to stop repatriation based on coercion. Plaintiffs had argued that the refugees' situation was unreasonable and that their choice between staying or going home was impossible. In the end, the refugees received the relief they had always sought: entry into the United States. The governmental branch that granted this relief was the executive, which, with military personnel on the ground, recognized the harsh truth of the camps. Relief did not come from the courts, which told a story of difficult but hopeful conditions for "migrants."

## VI. CONCLUSION

The contrasting outcomes of the 1994 Cuban rafter crisis in Guantánamo reflect contrasting depictions of the crisis. In the political sphere, the military and the White House reacted to the desperation of thousands of

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<sup>335</sup> See Juan O. Tamayo, *Cuba's Rights Violations Persist Despite Advances, Group Says*, *MIAMI HERALD*, Oct. 10, 1995, at 6A (citing Human Rights Watch/America).

<sup>336</sup> See *id.*; Human Rights Watch, *Cuba: Dissident's Death Highlights Repressive Tactics* (Jan. 20, 2012), available at <http://www.hrw.org/americas/cuba>. In early 1996, thirteen Cuban refugees who had been intercepted in rafts and returned to Cuba under the United States' new "wet foot, dry foot" policy complained of threats from Cuban state agents, arrests, and accusations that they worked for the CIA. See Larry Rohter, *Returned Rafters: Cuba Defying Pact*, *S. FLA. SUN-SENTINEL*, Mar. 10, 1996, at 17A. Former Coast Guard officer Randy Beardsworth remarked that, even after resolution of the rafter crisis and adoption of new policy, ICE is unable to deport more than 10,000 Cuban nationals with final orders of deportation, most of whom are criminals, "because of the relationship with Cuba." Telephone interview with Randy Beardsworth, Catalyst Partners (July 22, 2011).

<sup>337</sup> See *Refugee Appeal Turned Down*, *ASSOCIATED PRESS*, Oct. 19, 1995. In September 1995, the General Accounting Office called the conditions in Guantánamo "difficult but, we believe, adequate." See GAO REPORT, *U.S. RESPONSE TO THE 1994 CUBAN MIGRATION CRISIS*, *supra* note 20, at 2.

<sup>338</sup> Telephone interview with Randy Beardsworth, Catalyst Partners (July 22, 2011).

<sup>339</sup> *Id.*

*balseros* with nowhere to go. Similar to the Haitians who repatriated after the return of their democratically elected leader, the Cubans proactively sought to remedy their situation and ultimately obtained parole. In the judicial sphere, courts denied constitutional rights to migrants in safe haven, but granted constitutional rights to enemy combatants in detention. While enemy combatants later became embroiled in the court system facing trials and prison sentences, the *balseros* ended up outside the court system starting new lives in the United States. Each sphere reached the appropriate outcome on its terms, and the *brisas del mar* finally directed the refugees to freedom.